1997

The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement

Lewis R. Katz
Case Western University School of Law, lewis.katz@case.edu

Case Western Reserve Law Review

Volume 36 1985-86 Number 3

THE AUTOMOBILE EXCEPTION TRANSFORMED: THE RISE OF A PUBLIC PLACE EXEMPTION TO THE WARRANT REQUIREMENT

*Lewis R. Katz**

The Supreme Court in recent years has aggressively pursued restrictions on a person's Constitutional protections from unreasonable searches and seizures. Perhaps no better example exists of the radically changing fourth amendment analysis than the automobile exception to the warrant requirement. This exception allows a law enforcement official with probable cause to believe that evidence of a crime is hidden in a vehicle to search that vehicle without obtaining a search warrant. This Article explores the genesis and unchecked growth of the automobile exception from a necessary outgrowth of the exigencies of protecting police officers and preventing tampering with evidence, to a confusing morass of interchangeably applied and contradictory rationales and unworkable, "bright-line" rules. In examining three 1985 Supreme Court cases, this Article identifies the contradictions and two highly disturbing trends in fourth amendment analysis: that the proponent of warrant protections has the burden of proving their benefit over law enforcement costs, and, the possible first steps towards a general, public place exception to the warrant requirement.

INTRODUCTION

DURING THE fifteen-year life of the Burger Court, a principal goal of the emerging conservative majority has been the reduction or elimination of the role of the fourth amendment[1] in criminal

* John C. Hutchins Professor of Law, Case Western Reserve University School of Law. A.B., Queens College (1950); J.D., Indiana University at Bloomington (1963).

The author thanks J. Andrew Hoerner for his editorial assistance.

1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

litigation. The Court has ruled with growing consistency against claims of fourth amendment violations,[2] using either a scalpel or an axe to excise the amendment's guarantees. One prime method of excising these guarantees is the enhancement of exceptions from the fourth amendment warrant requirement.[3] Less than two decades ago the Supreme Court proclaimed that warrantless searches are per se unreasonable under the fourth amendment, subject only to narrowly prescribed exceptions.[4] While the Court continues to pay lip service to this catechism,[5] its actions have transformed that policy into an historic relic, at least when the search takes place away from a home.[6]

No better example of the warrant requirement's demise exists than in the area of automobile searches. For fifteen years the Supreme Court has given, nearly every time, the requested exemption from the fourth amendment warrant requirement when the object of a search is an automobile and, recently, a container found in an automobile.[7] Warrants for searches of automobiles are on the

---

U.S. CONST. amend. IV.

2. *See generally* Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984) (discussing the current Supreme Court trend to limit the scope of the fourth amendment).

3. *See, e.g.*, Washington v. Chrisman, 455 U.S. 1, 7 (1982) (police officer needs no warrant to monitor arrestee's movement by remaining at his elbow); New York v. Belton, 453 U.S. 454, 460-61 (1981) (police may search interior compartments of an automobile and all containers found therein upon arrest of a car's occupants).

4. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (search of car taken from private driveway held unreasonable where there were no exigent circumstances, and it was not impractical to obtain a warrant); Katz v. United States, 389 U.S. 347, 357 (1967) (fourth amendment is intended to protect people and their legitimate expectations of privacy).

5. In United States v. Ross, 456 U.S. 798, 824-25 (1982) (upholding the search of all containers found in a vehicle), under the automobile exception, the Court quoted language from *Katz*, where it was held that " 'searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " Although *Katz* is quoted in *Ross*, the principle of the case was ignored. *See also* Colorado v. Bannister, 449 U.S. 1, 2-3 (1980) (no expectation of privacy in unconcealed objects in automobile's passenger compartment). *See generally* Katz, United States v. Ross: *Evolving Standards For Warrantless Searches*, 74 J. OF CRIM. L. & CRIMINOLOGY 172 (1983).

6. The one narrow limitation on the Court's willingness to forego the warrant requirement in places other than the home is preserved in United States v. Chadwick, 433 U.S. 1, 10-11 (1977) (holding fourth amendment prohibits searches in which there is a legitimate expectation of privacy even when in public). *See also* Arkansas v. Sanders, 442 U.S. 753, 762 (1979) (following *Chadwick*).

7. Carroll v. United States, 267 U.S. 132, 153 (1925) (where actual mobility of vehicle exists, and occupants cannot lawfully be arrested, a warrantless search is justified); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (since an automobile is always capable of being driven away, its inherent mobility justifies a warrantless search); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (warrantless search of an auto is upheld because one has a "lesser expectation of

verge of absolute extinction.[8] The expansion of opportunities for warrantless searches of motor vehicles results from a coalition of those Supreme Court Justices who do not believe that requiring a warrant prior to a search is important[9] and those who ordinarily do, like Justice Stevens, but who view the automobile as unique, merit-

---

privacy" in an automobile); Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973) (pervasive governmental regulation of the automobile justifies warrantless search of its interior); United States v. Ross, 456 U.S. 798, 822 (1982) (general impracticability of obtaining a warrant, based on the mobility of the vehicle, justifies a warrantless search of all closed containers which could contain the object of the search found in a lawfully stopped auto).

The one surviving limitation on this trend was established in Arkansas v. Sanders, 442 U.S. 753, 761-63 (1979) (held if probable cause focused on the item before it was placed into the car, then the item could not be searched without a warrant). Although Robbins v. California, 453 U.S. 420 (1981), suspended the expansion of the exception for approximately 11 months, the trend resumed in *Ross* and was extended to all containers found in a lawfully stopped car.

8. The remaining limitation on the exception was established in Arkansas v. Sanders, 442 U.S. 753, 761-63 (1979) (a warrant to search must be obtained if probable cause focuses on the item prior to its placement into an auto), and reaffirmed in Oklahoma v. Castleberry, 105 S. Ct. 1859 (1985). This limitation is severely threatened by the Supreme Court's most recent cases, which evince a trend toward sanctioning warrantless searches of any item exciting probable cause in public. Another limitation was established in Coolidge v. New Hampshire, 403 U.S. 443, 462 (1971) (police may not disregard an obvious, pre-existing opportunity to obtain a search warrant). This limitation has been preserved by some courts by invalidating warrantless searches where there was pre-existing probable cause and police unreasonably delayed in securing a warrant. *See, e.g.*, United States v. Harvey, 437 F.2d 1, 3 (5th Cir. 1971); Kaufman v. United States, 453 F.2d 798, 802 (8th Cir. 1971). The limitation may have been discarded in Cardwell v. Lewis, 417 U.S. 583, 593-95 (1974) (scraping paint from impounded automobile's exterior upheld as violating no expectation of privacy).

9. They are Justices White, Rehnquist, Blackmun and O'Connor. *E.g.*, California v. Minjares, 443 U.S. 916, 925 (1979) (Rehnquist, J., dissenting from denial of stay) (Justice Rehnquist rejects both the exclusionary rule and the judicial preference for warrants, quoting Justice Stone in McGuire v. United States, 273 U.S. 95, 99 (1927), " 'A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule.' ").

> It is often forgotten that nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants . . . . "[I]n emphasizing the warrant requirement over the reasonableness of the search the Court has 'stood the fourth amendment on its head' from a historical standpoint."
>
> In emphasizing the warrant requirement the Court has . . . not only erected an edifice without solid foundation but also one with little substance.

Robbins v. California, 453 U.S. 420, 438-39 (1981) (Rehnquist, J., dissenting) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Harlan, J., dissenting)); United States v. Chadwick, 433 U.S. 1, 20 (1977) (Blackmun, J., dissenting) ("[A] warrant would be routinely forthcoming in the vast majority of situations where the property has been seized in conjunction with the valid arrest of a person in a public place. I therefore doubt that requiring the authorities to go through the formality of obtaining a warrant in this situation would have much practical effect in protecting Fourth Amendment values."); Chimel v. California, 395 U.S. 752, 773-74 (1969) (White, J., dissenting) (though not a complete repudiation of the warrant requirement, Justice White's proposed reasonableness test, based on the abstract notion that warrantless searches incident to arrest are inherently reasonable, evinces a lesser regard for the warrant requirement).

ing anomalous treatment.[10] Even the most liberal wing of the Supreme Court, Justices Brennan and Marshall, to some extent, share Justice Stevens' view that automobiles are unique but do not join in Stevens' approval of the more recent expansions of the automobile exception.[11]

Conventional fourth amendment jurisprudence has long proclaimed the joint values of protecting the privacy of the individual and limiting police discretion by requiring judicial approval prior to a search. Sanction of warrantless intrusions should only be approved in the presence of genuine exigent circumstances, indicative of law enforcement interests sufficiently urgent to overwhelm the values the warrant requirement protects.[12] The Burger Court has systematically eroded this principle. For automobile searches, the Court has replaced the exigency requirement with irrebuttably pre-

10. They are Justices Stevens, Powell and Stewart. Robbins v. California, 453 U.S. 420, 448 (1981) (Stevens, J., dissenting) (Justice Stevens merely restated the *Chambers* assertion that searches of automobiles generally involve exigent circumstances); United States v. Ross, 456 U.S. 798, 826 (1982) (Powell, J., concurring) (although reasonable expectation of privacy is generally decisive in search cases, "it is essential to have a court opinion in *automobile* search cases that provides 'specific guidance to the police and court . . . .' ") (emphasis in original); Robbins v. California, 453 U.S. 420, 422-28 (1981) (Stewart, J., for the plurality) (holding that a warrant is required to search a sealed, opaque container, even when found in an automobile but affirming the automobile exception itself "even where neither mobility nor any exigency is present").

11. While not joining Justice Stevens' approval of the more recent expansions of the automobile exception, Justices Brennan and Marshall joined the majority in Chambers v. Maroney, 399 U.S. 42 (1970), which paved the way for the current treatment of automobiles. Moreover, the two have seemingly never recognized the mischievousness of the decision in *Chambers* which opened the door to the later decisions which they have opposed. While *Chambers* did not make succeeding cases inevitable, they were made probable by the foundation laid in *Chambers*.

12. Adherence to judicial process prior to an intrusion has been deemed to provide the only effective guarantee of the fourth amendment's assurance that the American people should be secure from unreasonable searches and seizures. As a result, the Court has not treated the warrant requirement as a mere technicality or as a nuisance to be avoided on the barest showing of inconvenience. *See* McDonald v. United States, 335 U.S. 451, 455 (1948) (mere police inconvenience does not justify foregoing warrant requirement); Wong Sun v. United States, 371 U.S. 471, 481-82 (1963) (warrant process interposes the impartial judgment of a judicial officer between the citizen and the police); Katz v. United States, 389 U.S. 347, 356 (1967) (warrant process provides an objective determination of probable cause with the imposition of limits on the scope of an intrusion). As stated by the Court in Johnson v. United States, 333 U.S. 10, 14 (1948):

> [T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.

(quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932)).

sumed, fictitious exigencies; fictions that seldom seem to fit the actual facts of the cases. Alternatively, the Court allows the effects of long past exigencies to linger and extinguish obvious privacy interests. The purported justifications for these incursions not only have been unsound but incoherent. By applying diverse justifications for not obtaining a warrant and shifting justifications from case to case,[13] the present Court exploits this "labyrinth of uncertainty"[14] to negate constitutional restraints on police behavior.

Three 1985 decisions illustrate and continue this practice. In *United States v. Johns*,[15] Justice O'Connor, writing for the majority, upheld the warrantless search of a package stored in a government warehouse. The Court found the search exempt from the warrant requirement under the automobile exception even though the package had been seized by federal agents from a vehicle three days before it was searched.[16] Notwithstanding the majority's claim that the holding has limits,[17] *Johns* stands for the proposition that once an item is taken from an automobile it will be treated as though it were just removed from the automobile for purposes of determining fourth amendment questions. This decision totally undermines the same fourth amendment jurisprudence referred to by the Court affirming the value of judicial approval prior to a search.[18]

---

13. The Court has applied the following justifications: a) mobility, b) diminished expectation of privacy, and c) impracticability of obtaining a warrant. The Court has employed a Procrustean approach, squeezing, stretching or discarding numerous rationales to suit its purposes. In the following cases, mobility as a rationale for warrantless searches appears, disappears and finally appears once again. Carroll v. United States, 267 U.S. 132, 152 (1925) (actual mobility of the vehicle constitutes exigency justifying warrantless search); Chambers v. Maroney, 399 U.S. 42, 50-52 (1970) (inherent mobility—that "someone" could drive a vehicle away justifies a warrantless search); Cardwell v. Lewis, 417 U.S. 583, 588-92 (1974) (diminished expectation of privacy in the exterior of one's vehicle allows warrantless search); Ross v. United States, 456 U.S. 798, 806-07 (1982) (general impracticability of obtaining a warrant based on inherent mobility of vehicle justifies a warrantless search); California v. Carney, 105 S. Ct. 2066, 2070-71 (1985) (the pervasive regulation of motor vehicles and ready mobility of a motor home justify a warrantless search of the motor home's interior); United States v. Johns, 105 S. Ct. 881, 885-86 (1985) (validating warrantless search absent mobility on general notions of impracticability).

14. 2 W. LAFAVE, SEARCH & SEIZURE § 7.2, at 509 (1978) [hereinafter referred to as SEARCH & SEIZURE].

15. 105 S. Ct. 881 (1985).

16. "There is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure." *Id.* at 885 (citing Texas v. White, 423 U.S. 67, 68 (1975) (per curiam); Chambers v. Maroney, 399 U.S. 42, 52 (1970)).

17. "[W]e do not suggest that police officers may indefinitely retain possession of a vehicle and its contents before they complete a vehicle search." United States v. Johns, 105 S. Ct. 881, 887 (1985) (citations omitted).

18. *See supra* note 12.

In *California v. Carney*,[19] the Court upheld the warrantless search of a motor home parked on a public street. The Court was confronted directly with a situation in which a mechanical application of the automobile exception would involve a violation of the privacy interest in the home, an interest that even the staunchest opponents of the fourth amendment would ordinarily view as worthy of protection.[20] Neither exigent circumstances nor mere impracticability[21] could justify the search in *Carney*. Consequently, the Court momentarily abandoned impracticability and once again relied upon the inherent mobility of automobiles as a justification for the exception.[22] By ignoring the substantial privacy interest in one's home simply because the residence is potentially mobile, the majority has elevated the automobile exception above the interests which the general rule requiring a warrant is intended to protect.[23] *Carney* demonstrates the Court's continued willingness to use the automobile exception to justify searches which would otherwise clearly be deemed impermissible.

Finally, the Supreme Court in *Oklahoma v. Castleberry*[24] affirmed without opinion one of the last, scant limitations on the automobile exception. That limitation, however, is so anomalous in light of the other automobile search cases that clarification is desperately needed. In 1985, the automobile exception continued to triumph over the warrant requirement,[25] well on the way to fulfilling former Justice Stewart's concern that the word "automobile" is about to become "a talisman in whose presence the fourth amend-

19. 105 S. Ct. 2066 (1985).

20. *See* United States v. Chadwick, 433 U.S. 1, 7 (1977) (government sought to distinguish homes, offices and conversations as lying at the core of the fourth amendment, from everything else).

21. Indeed, at the time of the first search, conducted ostensibly as a "protective sweep," the suspect was safely in custody. People v. Carney, 34 Cal. 3d 597, 610, 668 P.2d 807, 814, 914 Cal. Rptr. 500, 507 (1983). "None of the officers testified that they had any reason to believe there were other suspects inside [the mobile home]." *Id.* at 613, 668 P.2d at 816, 194 Cal. Rptr. at 509. Similarly, the subsequent warrantless search at the station house was unjustified because the arrest eliminated the threat that the vehicle or its contents could be put out of reach of a judicially approved search.

22. In Carroll v. United States, 267 U.S. 132 (1925), the Court held that the actual mobility of the vehicle, and thus its capacity to be driven away with the evidence inside, justified a warrantless search on the spot. However, in *Carney*, no mobility threat existed because the defendant was under arrest and was going to be transported to the police station.

23. The dissenting Justice Stevens stressed: "The Court errs . . . [by] accord[ing] priority to an exception rather than to the general rule, and it has abandoned the limits imposed by prior cases." California v. Carney, 105 S. Ct. 2066, 2071 (1985) (Stevens, J., dissenting).

24. 105 S. Ct. 379 (1985).

25. *See supra* note 8.

ment fades away and disappears."[26]

The decisions in *Johns* and *Carney* are a total betrayal of the Court's traditional catechism that warrantless searches are per se unreasonable. Decisions have been rendered which weaken controls upon searches and seizures in violation of basic fourth amendment jurisprudence and truths, while the Court quotes those truths and purports to reaffirm their continuing validity. The activist majority has seemingly substituted a political agenda in place of constitutional theory.[27] For decades, Supreme Court justices have chided each other for their lack of consistency when deciding fourth amendment issues.[28] That inconsistency has been exacerbated by the new activist majority's strenuous efforts to dissolve established fourth amendment restraints.[29] Nowhere has the inconsistency

---

26. *Castleberry* lacks precedential value, coming on a tie vote during Justice Powell's absence. Hertz v. Woodman, 218 U.S. 205, 213-14 (1910) (tie votes carry no precedential value); Etting v. President, Directors and Co. of Bank, 24 U.S. 59 (1826).

Not discussed is United States v. Sharpe, 105 S. Ct. 1568 (1985), which involved the search of an automobile, but rather than relying on the automobile exception, focused upon the proper length of an investigative stop under Terry v. Ohio, 392 U.S. 1, 21-26 (1968) (police having reasonable apprehension of danger may conduct "stop and frisk" short of arrest, limited by the exigencies of the situation). Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971).

27. *See infra* note 31.

28. Reluctantly concurring in the judgment in Robbins v. California, 453 U.S. 420 (1981), Justice Powell lamented that "the law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided." *Id.* at 430 (Powell, J., concurring). *Robbins* consisted of no less than five separate opinions. In New York v. Belton, 453 U.S. 454 (1981), decided on the same day as *Robbins*, dissenting Justice Brennan accused the majority of disregarding the facts, ignoring precedent and principle and "adopt[ing] a fiction." *Belton*, 453 U.S. at 466 (Brennan, J., dissenting). In Chambers v. Maroney, 399 U.S. 42 (1970), Justice Harlan, dissenting from the Court's sanctioning of a warrantless search based on the "inherent mobility" of an automobile, opined that the Court's great step forward was "seriously at odds with generally applied Fourth Amendment principles." *Chambers*, 399 U.S. at 65, (Harlan, J., dissenting). Finally, in Cady v. Dombrowski, 413 U.S. 433 (1973), Justice Rehnquist wrote: "[T]he decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web." *Dombrowski*, 413 U.S. at 440.

29. Several Justices complain that the Court has seemingly gone out of its way to address fourth amendment issues. For instance, in *Carney*, Justice Stevens, joined by Brennan and Marshall, wrote:

> The Court's decision to forge ahead has established a rule . . . that is to be followed by the entire nation. If the Court had merely allowed the decision below to stand, it would have only governed searches . . . in a single State . . . .
>
> Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles."

California v. Carney, 105 S. Ct. 2066, 2073 (1985) (Stevens, J., dissenting). *See also* New Jersey v. T.L.O., 105 S. Ct. 733, 759 (1985) (Stevens, J., concurring in part and dissenting in part) ("I continue to believe that the Court has unnecessarily and inappropriately reached out

been more apparent than in the reconstituted theoretical justifications tendered to explain the transformation of the automobile exception from a limited exception to a general exemption standing alone without reason or principle. Different rationales have been offered to explain the exception's existence, but each successive expansion has outstripped the theoretical basis advanced to support the prior escalation, requiring the development of additional and new theoretical and strained underpinnings.[30]

The automobile exception knows virtually no bounds and clearly cannot continue to be tied to the automobile itself. For example, the *Carney* Court's decision to ignore the privacy expectation in one's dwelling seems to derive from the presence of the vehicle on a public street[31] and intimates an approval of the public place, probable cause exception previously rejected by the Court in *United States v. Chadwick*.[32] The deference shown to police convenience in the automobile exception cases cannot be explained by the peculiar nature and mobility of vehicles because these factors had been neutralized prior to the searches in *Carney* and all of the other critical cases of the past fifteen years. On the other hand, the deference to police convenience does reflect the skepticism that the Court has in the value of requiring police to secure a warrant before searching an item seized outside of a home.[33]

---

to decide a constitutional question"); United States v. Sharpe, 105 S. Ct. 1568, 1596-97 (1985) (Stevens, J., dissenting) (regarding the interest in providing law enforcement guidance through the writing of fourth amendment opinions

> as paramount would support the wholesale adoption of a practice of rendering advisory opinions at the request of the Executive—a practice the Court abjured at the beginning of our history. We have, instead, opted for a policy of judicial restraint—of studiously avoiding the unneccessary adjudication of constitutional questions.

(footnote omitted)); Florida v. Rodriguez, 105 S. Ct. 308 (1984) (Stevens, J., dissenting):

> We do not have . . . supervisory responsibility to correct mistakes that are bound to occur in the thousands of state tribunals throughout the land. The unusual action the Court takes today illustrates how far the Court may depart from its principal mission when it becomes transfixed by the spectre of a drug courier escaping the punishment that is his due.

Rodriguez, 105 S. Ct. at 311.

30. *See supra* note 13.

31. California v. Carney, 105 S. Ct. 2066 (1985). Chief Justice Burger states:

> Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

Id. at 2071 n.3.

32. 433 U.S. 1, 14-15 (1977) (items manifesting owner's legitimate expectation of privacy are due fourth amendment protection and require warrant for search once they are reduced to police control, absent an emergency).

33. *See supra* note 9.

This Article will discuss the scope and development of the automobile exception and its radical extension in *Johns* and *Carney*, the limitation upon the exception narrowly affirmed in *Castleberry*, and the likely development of the exception and what it portends for the future of the fourth amendment's warrant clause.

I. DEVELOPMENT OF THE AUTOMOBILE EXCEPTION

Despite Justice Stevens' attempt to trace the automobile exception to the first Congress, this exemption from the fourth amendment warrant requirement is a product of the past sixty years. In that period, the exception has grown from a limited grant of authority to search without a warrant based upon necessity to a broad general exemption from the warrant process unattended by necessity or even any showing of inconvenience.[34]

A. *The Automobile Exception's Origins*

The fourth amendment protects citizens from unreasonable searches and seizures and requires that "normally searches of private property be performed pursuant to a search warrant."[35] Consequently, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable."[36] The reasonableness of a search should not be judged abstractly, but rather, by how it conforms to the requirements of the warrant clause. The fourth amendment contains two, non-alternative requisites to determine reasonableness: that the search be authorized by a neutral and independent magistrate and that the authorization be supported by probable cause. The existence of probable cause does not excuse the absence of a warrant.[37] The critical inquiry is therefore to determine the reasonableness of securing a warrant in light of the facts confronting the police officer.[38]

34. Justice O'Connor, writing for the majority in *Johns* stated: "A vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contains contraband, and there is *no requirement of exigent circumstances* to justify such a warrantless search." United States v. Johns, 105 S. Ct. 881, 885 (1985) (emphasis added).

35. Arkansas v. Sanders, 442 U.S. 753, 758 (1979).

36. Katz v. United States, 389 U.S. 347, 357 (1967) (emphasis in original).

37. The Supreme Court has declared warrantless searches unlawful "notwithstanding facts unquestionably showing probable cause." *Id.* at 357 (quoting Agnello v. United States, 269 U.S. 20, 33 (1925)).

38. Circumstances which have seemed relevant to courts include (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; . . . (2) reasonable belief that the contraband is about to be removed; . . . (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; . . . (4) information indicating the possessors of the contraband are

American jurisprudence deemed a determination by judicial processes prior to any government intrusion as the most viable way to ensure the right of the people to be secure from unreasonable searches and seizures.[39] Unlike the exclusionary rule, which initially offers rewards only to the guilty,[40] the warrant process offers its protection to innocent and guilty alike. Justice Stewart wrote that "[t]he amendment is designed to prevent, not simply redress, unlawful police action."[41] The purpose of the warrant requirement, based upon the doctrine that individual freedoms are best preserved by separation of powers,[42] is to interpose the impartial judgment of a judicial officer between the citizen and the police, to provide an objective evaluation of probable cause,[43] and to insure that limits are placed upon the scope of an intrusion.[44] Without the warrant procedure, individual privacy depends only upon review on a motion to suppress, "too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."[45]

---

aware that the police are on their trail; . . . and (5) the ready destructibility of the contraband . . . .

United States v. Rubin, 474 F.2d 262, 268 (3d Cir. 1973) (citations omitted), *cert. denied*, 414 U.S. 833 (1973).

39. *E.g.*, Chimel v. California, 395 U.S. 752, 761 (1969) (warrant requirement was colonists' reaction to general warrants and warrantless searches); United States v. Ventresca, 380 U.S. 102, 106 (1965) (search with warrant accorded preference in marginal cases over warrantless searches).

40. For the role and appropriate scope of the exclusionary rule, see generally, 1 SEARCH AND SEIZURE, *supra* note 14, §§ 1.1 to 1.11, at 3-219; Kamisar, *Does (Did)(Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

41. Chimel v. California, 395 U.S. 752, 766 n.12 (1969).

42. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 943-44 (1963), *quoted in*, United States v. United States District Court, 407 U.S. 297, 317 (1972).

43. Wong Sun v. United States, 371 U.S. 471, 481-82 (1963); *see also supra* note 12.

44. In Katz v. United States, 389 U.S. 347, 356-57 (1967), the Court stated:

> [The arresting officers] were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself to observe precise limits established in advance by specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.

45. Beck v. Ohio, 379 U.S. 89, 96 (1964).

The suppression process and the exclusionary rule are open to criticism because they offer protection only to those who are discovered with reliable evidence of guilt. Those who are innocent have no comparable relief except protracted civil litigation. Rigorous enforcement of the warrant requirement, of course, provides protection for the innocent as well as the

The warrant process may be bypassed legitimately when the costs associated with securing a warrant, such as a necessary delay, outweigh the acknowledged benefits.[46] Permitted are warrantless searches and seizures which fit within "a few specifically established and well-delineated exceptions" to the warrant requirement.[47] These exceptions are "jealously and carefully drawn,"[48] in order to guarantee that they are "justified by absolute necessity" and do not become the general rule.[49]

The government agency seeking exemption from the warrant requirement bears the burden of justifying its failure to obtain a warrant[50] and also the scope of its warrantless intrusion. Courts should accommodate only legitimate exigencies and societal needs to remain consistent with these principles.[51] Such valid needs include danger to law enforcement officers and the prevention of destruction or loss of relevant evidence.[52] The warrant requirement was more stalwartly enforced when the Supreme Court held that police inconvenience would not justify bypassing the warrant process. Rather, the Court maintained that the state must show "some grave

guilty prior to the intrusion. *See generally* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 190 (1966); Plumb, *Illegal Enforcement of the Law*, 24 CORN. L.Q. 337, 371 (1939).

46. *See infra* note 49.

47. Katz v. United States, 389 U.S. 347, 357 (1967).

48. Jones v. United States, 357 U.S. 493, 499 (1958).

49. United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting); *see also* McDonald v. United States, 335 U.S. 451, 454 (1948) ("[T]here must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances."); Johnson v. United States, 333 U.S. 10, 14-15 (1948) ("There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with."). Attempting to limit warrantless intrusions through the judicial preference for a warrant is consonant with the intent of the framers of the amendment. *See supra* note 15. Although not faced with the plethora of warrantless searches found in modern America, the framers were highly suspicious of official incursions into individual privacy falling outside the realm of judicial review. For a recent discussion of the historical background and circumstances which led to the fourth amendment, see, Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 617-20 (1982).

50. United States v. Jeffers, 342 U.S. 48, 51 (1951) ("[T]he burden is on those seeking exemption to show the need for it . . . ."); McDonald v. United States, 335 U.S. 451, 456 (1948) ("We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.").

51. Arkansas v. Sanders, 442 U.S. 753, 760 (1979); *see also* Mincey v. Arizona, 437 U.S. 385, 393 (1978) (warrantless search of homicide scene at a home unconstitutional absent exigent circumstances); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (exigencies justifying search incident to arrest and automobile exception inapplicable to search of impounded car at police station).

52. Chimel v. California, 395 U.S. 752, 763 (1962).

emergency" to justify a warrantless intrusion.[53] When facing an exigency such as danger or the risk of losing evidence, a police officer need not postpone a search to obtain a warrant.[54] The scope of a warrantless intrusion should be limited to the satisfaction of that societal need which justified the police officer's failure to secure a warrant.[55] Authority to engage in fourth amendment intrusions without prior judicial approval should extend only to the time and area relevant to the exigency[56] and should terminate the instant that the emergency is neutralized.[57] When the exigency no longer exists, standard constitutional procedures, including the full protection of the warrant requirement, should fully govern the situation,[58] even if

---

53. McDonald v. United States, 335 U.S. 451, 455 (1948):

> The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police . . . . It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.

54. Chimel v. California, 395 U.S. 752, 762-63 (1969):

> [I]t is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

Preston v. United States, 376 U.S. 364, 367 (1964):

> The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest.

55. *See* Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1388 n.292 (1977) (faced with conflicting lines of authority, the Warren Court viewed warrant authorization as ordinarily necessary prior to search).

56. This was the policy behind the development of the "control test" in Chimel v. California, 395 U.S. 752 (1969). That test allowed an officer to search the area within the control of the arrestee without either a warrant or probable cause to protect the officer against an undetected weapon or the destruction of evidence. *Id.* at 762-63. This test was based on the principle that the intrusion should be limited to the emergency which originally justified the intrusion. *But see* New York v. Belton, 453 U.S. 454, 459 (1981) (permitting search of passenger compartment of vehicle and all containers found within that compartment as incident to "custodial arrest" of recent occupant of vehicle even where such person posed no threat to either officer or evidence). The *Belton* majority's "bright-line" rule was inappropriate because the propriety of a search should be determined on an individual basis. *See generally* LaFave, *Case-by-Case Adjudication Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. CT. REV. 127, 141 (1974) (sophisticated rules attractive to lawyers are impossible for officer in the field to apply).

57. *See* Michigan v. Tyler, 436 U.S. 499, 511 (1978) (government officials may enter building to fight fire and determine its cause, but additional entries are authorized only pursuant to warrant process).

58. The permissibility of an intrusion is a judgment call. In holding that police may not use deadly force to stop a fleeing felon unless the officer is threatened with like force, the

a partial intrusion has already occurred.[59]

The automobile exception originated in 1925 in *Carroll v. United States*.[60] Investigating officers there faced a situation which required immediate action or the likely permanent loss of contraband. From this humble origin sixty years ago, the automobile exception has grown into a general exclusion from the warrant requirement.

The occupants of the automobile in *Carroll* were not, nor could they have been, arrested.[61] Government liquor agents were confronted with three choices: to let the automobile continue on its way while the agents applied for a search warrant; to seize and immobilize the automobile and strand its occupants, while applying for a search warrant; or to conduct an immediate warrantless search of the vehicle on the highway. As the harbinger of the practice which would develop, the government agents conducted an immediate search and then turned to the courts to sanction their action.[62] The crucial difference between *Carroll* and the modern cases is that in *Carroll* the government could demonstrate necessity for bypassing the warrant process, and distinctions between intrusions were, as of then, undeveloped.[63] The Supreme Court in *Carroll* had little difficulty upholding the agents' conduct because it was consistent with constitutional principles.

The "automobile exception" of *Carroll* turned on the existence

---

Supreme Court, in Tennessee v. Garner, 105 S. Ct. 1694, 1699 (1985) (citations omitted), stated:

> To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' . . . Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out.

See also Terry v. Ohio, 392 U.S. 1, 25-26 (1968) (A warrantless search must be "strictly circumscribed by the exigencies which justify its initiation.").

59. *But see* United States v. Jacobsen, 104 S. Ct. 1652, 1661 (1984) (field test of package by government agents does not require warrant when initial partial intrusion was made by private party).

60. 267 U.S. 132 (1925).

61. The federal agents did have probable cause, but because the crime was a misdemeanor not committed in their presence, the agents could not arrest the defendants. *Id.* at 137. The current view is that an officer needs only probable cause to believe that the offense is being committed in his presence. *See* 2 SEARCH AND SEIZURE, *supra* note 14, § 5.1(c) at 237.

62. *Carroll*, 267 U.S. at 136.

63. 2 SEARCH AND SEIZURE, *supra* note 14, § 7.2(a)(2) at 510-11 (agents had no occassion to obtain warrant because they were not looking for defendants at time they appeared). The effect of seizure of the vehicle to strand the unarrested defendants was not considered by the Court.

of exigent circumstances to justify the warrantless search of the vehicle. The Supreme Court held that the warrantless search was valid because the automobile's mobility, coupled with the agents' probable cause to believe that contraband was secreted within the car, constituted the exigency and created a legitimate societal interest to search without a warrant rather than risk permanent loss of the evidence.[64] That exigency requirement, however, became lost in the shuffle between *Carroll* and the later automobile exception cases.

B. *Growth Years*

In the decades following the *Carroll* decision, there was little development of the automobile exception. Few instances required reliance upon the exception, consequently there was little pressure to expand. *Carroll* arose from anomalous facts, unlikely to be repeated.[65] In most cases decided prior to 1970, automobile searches were conducted incident to the arrest of the driver.[66] Where courts did rely upon the automobile exception, it was generally in tandem with that older and more established search warrant exemption.[67] Following an arrest, searches without independent probable cause were allowed so as to assure the safety of the arresting officer and to prevent the arrestee from destroying evidence.[68] The extent of judicial reliance upon the automobile exception was unclear[69] because searches incident to arrest, at that time, extended to the entire

64. *Carroll*, 267 U.S. at 153-56 (1925).

65. *Id.* at 137.

66. Prior to Chimel v. California, 395 U.S. 752, 768 (1969) (area subject to warrantless search incident to arrest is limited to area within immediate control of arrestee at time of search), there was little need for an automobile exception. Since most searches of automobiles followed arrests, the scope of a search incident to arrest extended to the entire premises where the arrest occurred. Courts assumed that a search incident to an arrest would extend to the entire automobile, since it extended to an entire house when it was the site of an arrest. United States v. Harris, 331 U.S. 145, 146 (1947).

67. *See generally* Grano, *supra* note 49, at 616-21 (1982). Professor Grano traces the origin of the search incident to arrest exception to colonial America. In light of the frequency with which warrantless searches incident to arrest were validated, it was hardly surprising for the Court to "tack on" the automobile exception to this pre-existing, accepted authority to conduct warrantless searches.

68. *See* J. HALL, SEARCH AND SEIZURE 236-37 (1982) (discussing purpose of search incident to arrest).

69. *See, e.g.*, Scher v. United States, 305 U.S. 251 (1938). Defendant was charged with transporting liquor without the requisite revenue stamps in violation of the Liquor Taxing Act. Acting on confidential information, federal officers observed the transfer of liquor to defendant's automobile. The officers followed the car to the defendant's garage, approached the defendant, and informed him of their belief that the car contained bootleg liquor. The defendant admitted that the car did contain whiskey, but that it was Canadian. The officers

premises in which an arrest took place.[70] If an entire house could be subject to a search incident to arrest,[71] then certainly an entire automobile, when the scene of an arrest, was subject to search.[72]

The automobile exception began to expand only after the Supreme Court reassessed the search incident to arrest doctrine. In *Chimel v. California*,[73] the Court limited the scope of such searches to the extent necessary to accomplish those legitimate societal needs which justified the exemption from the warrant requirement. Since warrantless searches incident to arrest are intended to deny the arrestee access to evidence, which he might seek to destroy, and access to weapons, the scope of the search need extend only to those areas within the reaching and grabbing distance of an arrestee at the time of the search.[74] Since an entire house was no longer subject to a warrantless search incident to arrest, similarly an automobile could not be subject to an incidental search once the driver and passengers were removed from the vehicle. Not all courts applied

---

opened the trunk without a warrant and found liquor in unstamped bottles. Defendant was arrested, and both the car and the liquor were seized. *Id.* at 253-54.

The Court found the search to be valid, basing part of its decision on the automobile exception. "Considering the doctrine of Carroll v. United States, . . . and the application of this to the facts then disclosed, it seems plain enough that just before [the Defendant] entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest." *Id.* at 254-55 (citations omitted). The Court also based its holding on search incident to arrest. "Examination of the automobile accompanied an arrest, without objection and upon admission of probable guilt." *Id.* at 255. This brief, ambiguous case illustrates the lack of clarity with which the Court dealt with warrantless searches of cars prior to *Chimel*.

70. United States v. Rabinowitz, 339 U.S. 56, 63-64 (1950) (search of an office incident to arrest upheld).

71. United States v. Harris, 331 U.S. 145 (1947). *But see* Chimel v. California, 395 U.S. 752, 768 (1969) (limiting area of search incident to arrest).

72. *See, e.g.*, Scher v. United States, 305 U.S. 251, 255 (1938) (search of auto incident to arrest upheld in combination with auto exception); United States v. Lee, 274 U.S. 559, 563 (1927) (upheld search of motorboat incident to arrest); Haverstick v. Indiana, 196 Ind. 145, 148-49, 147 N.E. 625, 626-27 (1925) (officers' search of defendant's car incident to arrest for speeding and search of packages, bundles, and bags carried by the arrested person held proper); Howell v. State, 18 Md. App. 429, 431-32, 306 A.2d 554, 557 (1973), *rev'd on other grounds*, 271 Md. 378, 386, 318 A.2d 189, 193 (1974) (held that there could be a valid "search incident" inside an automobile even though a search of the auto would not be permitted under the *Carroll* doctrine); Peterson v. State, 15 Md. App. 478, 489-93, 292 A.2d 714, 721-23 (1972) (search upheld under search incident to arrest *and* auto exception theories). For a discussion of search analysis involving autos under the search incident to arrest and auto exception theories, see Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987, 1012-22 (1976).

73. 395 U.S. 752, 765-68 (1969) (warrantless search of entire house, incident to arrest, held illegal).

74. *Id.* at 763.

Chimel's reasoning to automobiles,[75] but its logic remained compelling. Two decades later, however, the Supreme Court repudiated that reasoning when it expanded the scope of a search incident to the arrest of a recent occupant of an automobile to the interior compartment of the vehicle even though the occupants were no longer within reaching or grabbing distance.[76] By then, however, the automobile exception had been redeveloped. It had outstripped the limitations applicable to all other exceptions.

One year after the *Chimel* decision conformed searches incident to arrest with constitutional doctrine by defining the purpose and scope of exceptions to the warrant requirement, the Supreme Court allowed the automobile exception to strip its constitutional bounds. In *Carroll*, the Court did not have to recognize an independent automobile exception. Since the search in *Carroll* was grounded on exigent circumstances,[77] the Court could have set it forth as an example of the exigent circumstances exception to the warrant requirement.[78] It was, nonetheless, a carefully defined and limited exception based on a necessity arising from real exigencies and, therefore, consistent with traditional fourth amendment analysis.

That was not so of *Chambers v. Maroney*[79] where the Court upheld a delayed warrantless search of a vehicle immobilized when its

75. The New York courts, prior to New York v. Belton, 453 U.S. 454 (1981), shared this reluctance to apply the *Chimel* standard to cars. *See, e.g.*, People v. MacDonald, 61 A.D.2d 1081, 1082, 403 N.Y.S.2d 337, 339 (1978) (upholding under four distinct theories (plain view, search incident to arrest, inventory search and inevitable discovery) an automobile search by officer driving defendant's car to station while defendant was transported in police car); People v. Abramowitz, 58 A.D.2d 921, 922, 396 N.Y.S.2d 729, 731 (1976) (upholding as incident to arrest two searches of leather bag found behind driver's seat; noting existence of independent probable cause where contraband discovered on arrestee's person upon search outside of his automobile); People v. Goldstein, 60 Misc. 2d 745, 749, 304 N.Y.S.2d 106, 111 (1969) (upholding as search incident to arrest the search of a glove compartment when an officer was driving the car to the police station, even though the arrestee was in a different car and in the custody of another officer). *But see* People v. Lewis, 26 N.Y.2d 547, 551-52, 260 N.E.2d 538, 540, 311 N.Y.S.2d 905, 908 (1970) (search of automobile held not incident to arrest when defendant was on second floor of police station while car was searched).

76. New York v. Belton, 453 U.S. 454, 462 (1981) (scope of a search incident to arrest expanded to entire interior compartment of a vehicle and all containers found therein). Ironically, the *Belton* Court's rejection of the *Chimel* control principles in the context of the arrest of an occupant of an automobile repudiated the New York Court of Appeals' belated acceptance of the *Chimel* doctrine in the automobile context. People v. Belton, 50 N.Y.2d 447, 450, 407 N.E.2d 420, 422, 429 N.Y.S.2d 574, 576 (1980), *rev'd*, 453 U.S. 454 (1981).

77. The driver of the vehicle was not in custody and could have driven the car away while a warrant was sought. Carroll v. United States, 267 U.S. 132, 134-36 (1925).

78. *E.g.*, Johnson v. United States, 333 U.S. 10, 14-15 (1948) (no exceptional circumstances where arresting officers had ample time to obtain warrant prior to search and arrest).

79. 399 U.S. 42 (1970).

occupants were arrested. Once the arrestees were removed from the vehicle, the exigent circumstances recognized in *Carroll* ended. Police officers were not confronted with the possibility of the loss of the evidence nor any other "grave emergency."[80] Justice White wrote that because "the opportunity to search is fleeting since a car is readily movable,"[81] the automobile may be searched "immediately without a warrant or the car itself seized and held without a warrant for whatever period is necessary to obtain a warrant."[82] Lumping the fact situations in *Carroll* and *Chambers* together served Justice White's purpose, but he misrepresented the facts in *Chambers*. The automobile in *Carroll* was readily movable and its occupants could not be arrested or detained. In *Chambers* the officers had ample opportunity to detain the automobile because the occupants were already in custody. The police were in a position to ensure that the vehicle was not moved, even though it was inherently mobile. The seizure of the automobile did not inconvenience or strand any of the already arrested occupants.

Justice White stated that the probable cause to believe that the vehicle contained evidence sufficed to justify its seizure. He concluded that since an immediate search was no more intrusive than a seizure until a warrant is obtained, the search was justified.[83] This conclusion is remarkable for the number of errors it compounds. First, the Court has held in other contexts that a warrantless seizure is a less intrusive, preferred alternative to a warrantless search.[84]

---

80. *Cf.* McDonald v. United States, 335 U.S. 451 (1948). Police unsuccessfully attempted to justify a warrantless search of the suspect's home under the exigent circumstances exception, even though the suspect had been under surveillance for two months. The Court stated:

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.

Id. at 455.

81. *Chambers*, 399 U.S. at 51.

82. *Id.*

83. *Id.* at 52.

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Id. at 51-52.

84. Segura v. United States, 104 S. Ct. 3380, 3387 (1984) (securing arrestee's apartment

Second, at the time of the search the automobile *had already been seized*. Clearly a seizure *and* a search is more intrusive than a seizure alone. Third, in comparing the intrusions the Court seems to assume that seizure "until a warrant is served" will always result in issuance of a warrant. But the warrant process protects because warrants are not to be issued every time the police request them. Police officers often make mistakes in determining the existence of probable cause as well as in the scope of the intrusion so that a neutral magistrate will not always issue a warrant.[85] Finally, searches and seizures should not be so simply analogized because each interferes with a fundamentally different interest.[86] A search interferes with a privacy interest, while a seizure interferes with only a possessory interest.[87]

After concluding that an immediate search is no worse than a seizure, the Court proceeded to make a second leap over fourth amendment principles. It stated that the delayed search of the vehicle at the police station was justified on the grounds that there were exigent circumstances at the scene of the arrest which made an immediate search unsafe and impractical.[88] This conclusion turns the relationship between privacy rights and exigent circumstances on its

---

overnight pending issuance of a search warrant: "Recognizing the generally less intrusive nature of a seizure, the Court has frequently approved warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant. . . .") (citations omitted); United States v. Place, 462 U.S. 696, 707 (1983) (temporary seizure of luggage suspected of containing narcotics at airport based on "sniff test" by police dog: "[T]he manner in which information is obtained through this investigative technique is much less intrusive than a typical search."); United States v. Chadwick, 433 U.S. 1, 14 n.8 (1977) ("A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker."); United States v. Van Leeuwen, 397 U.S. 249, 252 (1970) (involving the temporary seizure of packages containing gold coins illegally imported into the United States: "The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right 'to be secure' in the 'persons, houses, papers, and effects' protected by the Fourth Amendment against 'unreasonable searches and seizures'.").

85. "[The warrant requirement] is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971) (citation omitted).

86. *See* Grano, *supra* note 49, at 648 (search and seizure interferes with various constitutional rights).

87. Of course, if one's privacy interest in the contents of a car is reduced, then the severity of the intrusion of a search is reduced to the same degree.

88. *Chambers*, 399 U.S. at 52 n.10:

> It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house.

head. Under standard fourth amendment jurisprudence, exigent circumstances temporarily overwhelm continuously present privacy rights.[89] *Chambers* treats the exigency as *extinguishing* the underlying privacy rights which remain suppressed well after the circumstances which originally justified the warrantless search have terminated. This is a deeply troublesome reversal.

Under the traditional analysis a person is entitled to the protection of an impartial judicial officer interposed between himself and the police. An exception arises only during the span of state-demonstrated and well-defined, compelling emergencies. The *Chambers* approach defines such emergencies as beginning when the police may conduct warrantless searches, but never defines its end point. The facts of *Chambers* suggest two limitations on this expansion of police power: first, that exigent circumstances beyond mere mobility are required to justify delaying a warrantless search; and second, that the search must not be delayed beyond a reasonable time. Both limitations were subsequently abandoned. Despite Justice White's assurance that the prior cases did not "require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords,"[90] the decision in *Chambers* started fourth amendment jurisprudence on that very journey. The decision effectively eliminated the exigent circumstance of actual mobility as the justification for avoidance of the warrant requirement.

In its place, the Court substituted a fiction of inherent mobility. A functioning automobile is always movable, but in *Chambers* and subsequent cases, the vehicle was under complete police control. The Court recognized the sham of inherent mobility when a majority of the Court conceded that "warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not non-existent."[91] The Court nevertheless continues to rely upon inherent mobility to justify its consistent differentiation of automobiles from other personal property,[92] especially when at-

89. *See infra* notes 103-13 and accompanying text (traditional fourth amendment jurisprudence).

90. *Chambers*, 399 U.S. at 50.

91. Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973).

92. Notwithstanding the lack of importance that mobility plays in determining the scope of the automobile exception, the Court has continued to at least pay lip service to a vehicle's mobility as one justification for the exception. *See* Robbins v. California, 453 U.S. 420, 425 (1981) (reviewing cases in which the Court claimed inherent mobility of vehicle made secur-

tempting to justify additional expansion of the automobile exception.[93]

The undefined termination point of exigent circumstances was still uncertain a few years later when the Court decided *Texas v. White*,[94] where no reason was offered to justify the delayed search without a warrant.[95] Today, even exclusive legal control of a package by the owner does not necessarily reassert extinguished privacy interests. In *Illinois v. Andreas*[96] the Court broadly held that once police have lawfully examined the contents of a container the owner has no privacy interest in its contents until there is "a substantial likelihood that the contents have been changed."[97] *Chambers* and *Andreas* read together could imply that once the police have a legal basis for the search of an automobile or container, they can search at any later time until there is a "substantial likelihood" that the owner has changed its contents.[98]

Another portion of the exigency theory for warrantless searches was replaced following *Chambers* with an evolving notion that the privacy interest in an automobile does not rise to the same level as

---

ing warrant impracticable and created exigency to justify automobile exception); Arkansas v. Sanders, 442 U.S. 753, 761 (1979) (citing cases in which an automobile's mobility distinguished it from other private property for which search warrant was required).

93. In United States v. Ross, 456 U.S. 798 (1982), the Court significantly expanded the scope of warrantless searches of automobiles and containers found in automobiles upon the premise that mobility justified foregoing the warrant requirement. "Given the nature of an automobile in transit, the [*Carroll*] Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance." *Id.* at 806-07. "The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance." *Id.* at 809.

94. 423 U.S. 67 (1975) (per curiam).

95. *Id.* at 67-69. Justice Marshall stated in dissent:

> [O]nly by misstating the holding of *Chambers v. Maroney*, . . . can the Court make that case appear dispositive of this one. The Court in its brief *per curiam* opinion today extends *Chambers* to a clearly distinguishable factual setting. . . . Since . . . there was no apparent justification for the warrantless removal of respondent's car, it is clear that this is a different case from *Chambers*.

Id. at 69-70 (Marshall, J., dissenting). This sentiment was voiced by the Texas Supreme Court in White v. Texas, 521 S.W.2d 255, 258 (1974), *rev'd*, 423 U.S. 67 (1975):

> [T]he search of appellant's car cannot be sustained under the automobile exception, for there is no showing in the evidence of any reasonable likelihood that the automobile would be moved. . . . In the absence of the "exigent circumstances" which are necessary to justify a warrantless search, we find no justification for a search without a warrant.

96. 463 U.S. 765 (1983).

97. *Id.* at 773.

98. *E.g.*, Gamble v. State, 480 So.2d 38 (Ala. Crim. App. 1985), *mem. cert. denied* (1985) (reading *Chambers* and *Andreas* together held police need not obtain warrant to search an immobilized automobile).

that interest in a home or office. The diminished expectation of privacy theory was applied for the first time in *Cardwell v. Lewis*,[99] dealing with the warrantless examination of the exterior of a murder suspect's vehicle. The Supreme Court premised the diminished expectation of privacy in a vehicle upon its function as transportation, that it seldom serves as a residence or repository of personal effects, and that a car has little capacity for escaping public scrutiny.[100] Ultimately, the Court found support for this argument in the regulation to which an automobile is subject as compared to a home.[101] Of course, as the *Cardwell* Court pointed out, that search was limited to the *exterior* of the vehicle and "nothing from the interior of the car and no personal effects, which the fourth amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence."[102] The theory of a diminished expectation of privacy was later used to justify the warrantless search of the *interior* of automobiles, even though every rationale offered in *Cardwell* failed when applied to the interior of a vehicle and to its separate storage compartments.[103] Nevertheless, the Court relied upon the diminished expectation of privacy rationale to further expand the automobile exception.

The Supreme Court searched for a decade for a plausible argument in support of exempting automobile searches from the warrant requirement. In *United States v. Ross*,[104] the Supreme Court de-

99. 417 U.S. 583, 591-92 (1974) (police had probable cause that suspect's automobile was involved in an alleged murder and obtained paint scrapings from exterior of the vehicle without his permission or a warrant; held that this "search" infringed upon no expectation of privacy).

100. *Id.* at 590.

101. *E.g.*, Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (extensive regulation leads to far greater police citizen contact on the road than in the home). *But see* Katz, *Automobile Searches and Diminished Expectations In The Warrant Clause*, 19 AM. CRIM. L. REV. 557, 571 n.79 (1982) (disputing Court's claim that the automobile's primary function is transportation by reference to printed and sung examples of the expanded role of the automobile in American society). *Compare*, CLEVELAND, OHIO ORDINANCES ch. 369 (1981) (detailed requirements for residences, such as dimensions, window area, ventilation, sanitation, water supply, garbage disposal, heating, electricity, maintenance, pest control, maintences of curtilage, access and egress), *with* CLEVELAND, OHIO ORDINANCES ch. 437 (1981) (requiring lights, reflectors, brakes, adequate muffler and an unobstructed windshield for an automobile).

102. *Cardwell*, 417 U.S. at 591.

103. Items secured out of sight in separate compartments are not subject to view, are in appropriate places for storing personal items, and are not subject to any special regulation. *Id.*

104. 456 U.S. 798 (1982). In this case, an informant told the police that the defendant was dealing heroin from his automobile. *Id.* at 800. Police officers stopped the defendant in his vehicle, searched it and discovered narcotics in a closed paper bag found in the trunk. *Id.*

cleared that the exemption always rested upon the "impracticability of securing a warrant in cases involving the transportation of contraband goods," grounded in a vehicle's inherent mobility.[105] The Court purported to return to the original rationale behind the automobile exception advanced by *Carroll*, but that reasoning could not support an automobile exception broad enough to cover the facts of *Ross*, nor did the Court discard expansions of the automobile exception achieved under now discredited and discarded rationales.[106]

The *Ross* situation compelled the Court to abandon the diminished privacy rationale because its application to the search of two containers placed in the locked trunk of the automobile would have been laughable.[107] As the containers themselves were fully capable of supporting privacy interests, the Court simply dropped the diminished expectation of privacy rationale. Failing to find any genuine rationale for its "impracticability" justification, the majority attempted to justify the exception simply by its age, purporting to trace it back to the first Congress.[108] Justice Stevens' efforts to fash-

---

at 801. Another warrantless search was taken after the automobile was impounded, yielding cash in a zippered leather pouch. *Id.*

105. *Id.* at 806. Relying on *Carroll*, Justice Stevens, the author of the opinion, reviewed the *Carroll* Court's historical analysis of legislation enacted by the first Congress, distinguishing searches of houses from those of wagons or carriages.

> Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house . . . and like goods in course of transportation . . . and concealed in a movable vessel where they readily could be put out of reach of a search warrant.

Id. at 805-06 (1982) (quoting United States v. Carroll, 267 U.S. 132, 151 (1925).

106. The exception recognized in *Carroll* was based on the actual mobility of the vehicle searched on an open highway, where the suspect was not under arrest. In *Ross*, the Court claimed to return to mobility as a rationale, but the arrested suspect was never in any position to deny the police officer control of his vehicle.

107. Indeed, the Court implicitly acknowledged the rationale of earlier decisions that found that diminished expectations of privacy in luggage could not be legitimately connected to the location from which the luggage was seized. In Arkansas v. Sanders, 442 U.S. 753, 764-65 (1979), the Court had stated, in reliance on United States v. Chadwick, 433 U.S. 1 (1977), that

> a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means. . . . We therefore find no justification for the extension of *Carroll* and its progency to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by police.

See also 453 U.S. at 424-25 ("The automobile exception . . . is . . . supported by the diminished expectation of privacy which surrounds the automobile. . . . No such diminished expectation of privacy characterizes luggage.").

108. *Ross*, 456 U.S. at 811.

ion a horse-and-buggy exception to the warrant requirement demonstrated the Court's willingness to advance any argument in support of warrantless searches of automobiles in its effort to bypass standard constitutional procedures.[109] Thus, sixty years after it was born, but only a few years after it started to grow, the automobile exception abandoned the exigency of actual mobility for inherent mobility and general impracticability, and spawned and then terminated the rationale of a diminished expectation of privacy in automobiles.

C. *Application of the Exception to Containers*

Courts have had more difficulty applying the warrant exception to containers[110] found in automobiles than determining whether a warrant is needed to search the vehicle itself. It was not always so difficult. When the warrant requirement was only excused for immediate safety concerns or for the preservation of evidence, the standards governing such searches were discernable and easy to apply. As the warrant preference fades to mere memory, the tests have become more difficult to apply to new fact situations. They have been replaced by shifting tests which this pliant Court seemingly alters with each situation presented by a prosecutor. Ironically, simultaneous with this development has been the Supreme Court's announced policy of offering bright-line rules[111] on fourth

109. Ultimately, it must be realized that *Ross*, like all of the decisions upholding warrantless searches of automobiles since United States v. Chambers, 399 U.S. 42 (1970), deviated from the constitutional norm because there was no need to avoid obtaining a warrant since the police had already seized the two containers.

110. The term "containers," as used hereinafter, means a self-enclosed package in practically any shape or form; from those with seemingly high expectations of privacy, like luggage, purses and wallets; to those with lower expectations, such as boxes, bags and bales; to the odd and bizarre, like balloons, not typically associated with carrying goods.

111. "Bright-line rules" are those rules which are capable of mechanical application. In New York v. Belton, 453 U.S. 454 (1980), the Court formulated the bright-line rule that incident to the lawful arrest of a car's recent occupant, the entire passenger compartment could be searched. *Id.* at 460. The Court stated: "In short, '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.' " *Id.* at 458 (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)). The Court also quoted Professor LaFave:

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'

amendment issues in order to clarify and provide adequate guidance for police.[112]

In the case of containers seized from automobiles, the problem has been compounded because more than one exception to the warrant requirement might apply, and the results obtained under the standards for each exception might not be the same. Moreover, the Court's attempt to give bright-line guidance to the automobile exception has increased the confusion by casting doubt upon the continued vitality and validity of related doctrines governing other exceptions. The Court has eliminated the necessity principle as a governing standard, leaving confusion where once there was reason. This confusion is well-illustrated by examining the rationales utilized to allow warrantless searches of containers found in automobiles.

1. *Search Incident to Arrest*

Initially, searches incident to arrest were restricted by a control test, limiting both the area into which a search could legitimately take place and the time after which the search could no longer occur. Soon after promulgating this test, however, the Court repudiated its reasoning; limiting the items to which it applied while continuously contracting the formerly explicit time and area limitations. The decisions regarding container searches justified as incident to arrest appear muddled. As compared to similar searches justified under the automobile exception, the lines of decisions are not resolved.

Chimel v. California[113] provided a brilliant test that accommodated both fourth amendment principles and law enforcement needs without compromising either. Under the easily applied *Chimel* standards, a warrantless search was reasonable when made incident to arrest and until the arrestee could no longer threaten the arresting officer nor tamper with evidence. Thus, an arrestee's person and the area into which he might reach or grab for a weapon or evidence

New York v. Belton, 453 U.S. 454, 458 (1981) (quoting LaFave, *supra* note 56, at 141 (quotations omitted)).

112. As the title of Professor LaFave's article would suggest, the choices are not at all clear-cut. LaFave comments on the drawbacks of bright-line rules, by writing that such rules "fail to recognize 'that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract.' " LaFave, *supra* note 56, at 163 (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965)). *See also* United States v. Ross, 456 U.S. 798, 825 (1982) (It is important for . . . law enforcement officials . . . that the applicable rules be clearly established) (Blackmun, J., concurring).

113. 395 U.S. 752 (1969).

may be searched without a warrant or independent probable cause to believe that a weapon or evidence of the crime would be found.[114] Once the officer safely exercises dominion over the arrestee and reduces the immediately surrounding area to his control, it is no longer reasonable to search without a warrant issued by a neutral magistrate.[115] The *Chimel* test harmonized privacy and safety concerns and, at the same time, governed both the initial intrusion and the scope of that intrusion. Once the safety and preservation necessity for the initial intrusion has passed, the search may proceed no further in respect for privacy interests.[116] Courts, however, have been reluctant to limit the scope of searches under the test, bending over backwards to include as incidental to arrest searches of containers seized from arrestees where there clearly was no continuing necessity to justify the failure to obtain a warrant.[117] Moreover, the

---

114. *Id.* at 763.

115. This is consistent with the constitutional standard which provides that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (citations omitted). Furthermore, "[i]n cases where the securing of a warrant is reasonably practicable, it must be used." California v. Carney, 105 S. Ct. at 2074 (quoting Carroll v. United States, 267 U.S. 132, 156 (1925)).

116. This is consistent with the standard first announced in Terry v. Ohio, 392 U.S. 1 (1968), that in a case involving the warrantless "stop and frisk" investigation of a robbery suspect, a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Id.* at 25-26.

As applied in Mincey v. Arizona, 437 U.S. 385 (1978), the Court stated:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. . . . [A] four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search.

Mincey v. Arizona, 437 U.S. at 392-93. *See also* Michigan v. Tyler, 436 U.S. 499 (1978) (entry by firefighters in response to a fire, followed by a subsequent second search producing evidence of arson): "[O]nce the fire has been extinguished and the firemen have left the premises, the emergency is over. Further intrusion . . . should be accompanied by a warrant indicating the authority under which the firemen presume to enter and search." *Tyler*, 436 U.S. at 516 (White, J., concurring).

As one noted commentator has observed: "Any conduct within [the premises] by the officer which is in any way inconsistent with the purported reason for the entry is a just cause for healthy skepticism by the courts. . . . [I]t is essential that courts be alert to the possibility of subterfuge." 2 SEARCH AND SEIZURE, *supra* note 14, § 6.6 at 473. *Accord* Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFFALO L. REV. 419, 428 (1973) (courts must be vigilant to any attempt to circumvent the requirement of a warrant).

117. Part of this reluctance may simply be inability to apply the rule, as suggested by Justice Stewart in New York v. Belton, 453 U.S. 454, 458-60 (1981) (citation omitted):

> Although the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in

Supreme Court's guidance on this subject has not been consistent or clear.[118]

The Court seemed clear as late as 1977 when, in *United States v. Chadwick*,[119] a delayed warrantless search of a footlocker was not allowed. Federal officers conducted a sniff-test of a footlocker recently transported cross-country by rail. The test indicated that the footlocker contained a controlled substance. The agents arrested the suspects and seized the footlocker just as it was placed in the trunk of an automobile. Ninety minutes later, with the suspects under arrest, the agents opened and examined the footlocker at the federal building.[120] Chief Justice Burger stressed that from the moment the footlocker was seized, it was totally within the control of the arresting officers. There was neither the risk that the contents of the footlocker would be removed by the arrestees nor reason to believe that the footlocker contained explosives or other inherently

---

specific cases . . . . When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority. . . . [C]ourts have found no workable definition of the area within the immediate control of the arrestee.

Another reason for the reluctance to apply the *Chimel* standard stemmed from hostility to the principle and outright rejection of the rule, resulting in extreme distortions of the test. *See, e.g.*, Watkins v. United States, 564 F.2d 201, 205 (6th Cir. 1977), *cert. denied*, 435 U.S. 976 (1978) ("the authority to conduct a search incident to an arrest, once established, still exists even after the need to disarm and prevent destruction of evidence have [sic] been dispelled.").

The result of such distortion was that defendants as a class were treated as supermen capable of defying basic physical limitations so that courts could reach the conclusion that a defendant might still have exercised control in a given situation. *See, e.g.*, Collins v. Commonwealth, 574 S.W.2d 296 (Ky. 1978) (upholding warrantless search of a compartment inside an air conditioner four to seven feet away from the arrestee despite presence of three officers), *compare with id.* at 209 ("[u]nless [defendant] was an acrobat, a Houdini or Stretcho-Man I cannot conceive how the [air conditioning] panel could have fallen within the area of his immediate control) (Lukowsky, J., dissenting); Foster v. State, 297 Md. 191, 464 A.2d 986 (1983), *cert. denied*, 464 U.S. 1073 (1984) (though female defendant was handcuffed, proper to search drawer of nightstand); State v. Means, 177 Mont. 193, 581 P.2d 406 (1978), *rev'd on other grounds*, 187 Mont. 398, 610 P.2d 140 (1980) (after arrest, police search of area under bathtub and between mattresses upheld under theory that search incident to arrest may extend to all areas likely to contain instrumentalities of crime); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980) (search under rug producing gun upheld although defendant was handcuffed and seated in a chair in custody of several officers).

118. *Compare* Chimel v. California, 395 U.S. 752, 768 (1969) (holding the scope of a search incident to arrest must be strictly limited to the area a suspect might actually reach to obtain a weapon or destroy evidence) *with* New York v. Belton, 453 U.S. 454, 462-63 (1981) (upholding a warrantless search incident to arrest of a jacket within a vehicle's passenger compartment although the arrestees no longer had access to compartment).

119. 433 U.S. 1 (1977).

120. *Id.* at 3-4.

dangerous items.[121] It was not difficult to secure and store the footlocker at the federal building. As the Chief Justice concluded, there was no exigency justifying an immediate search without a warrant.[122]

The Court's opinion in *Chadwick* should not be read as limited to simply barring the delayed warrantless search of the footlocker. Although the majority opinion is not crystal clear on this point, its reasoning appears to bar the warrantless search of the footlocker once it was seized and under the control of the officers at the scene of the arrest, just as it barred the delayed search ninety minutes later at the federal building. The Chief Justice applied the *Chimel* test and wrote:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.[123]

The *Chadwick* ruling provided bright-line guidance similar to *Chimel*, without labeling it as such. *Chadwick*'s bright-line rule is consistent with fourth amendment principles; as soon as the emergency passes and police exercise control over the receptacle, it is unreasonable for officers to proceed further without a warrant.[124] Consequently, in *Chadwick*, the Court stated that the proper procedure would have been to store the footlocker until a warrant issued.[125] Nothing indicated a differing result had the footlocker

---

121. *Id.* at 4.

122. *Id.* at 11.

123. *Id.* at 15. Whether the agents could have conducted a search incident to arrest of the suspect's footlocker was a subject of disagreement between Justice Brennan, concurring, and Justice Blackmun, dissenting. Said Brennan: "[I]t is not obvious to me that the contents of the heavy, securely locked footlocker were within the area of their 'immediate control' for purposes of the search-incident-to-arrest doctrine." *Id.* at 17 n.2. Blackmun countered: "[The footlocker] certainly . . . would have been properly subject to search at the time [of arrest]. . . ." *Id.* at 23 (footnote omitted).

124. *Chadwick* is not an automobile exception case. The government never contended that the foot locker's momentary presence in the automobile made the search valid. Indeed, had the government even attempted to so argue the applicability of the automobile exception, the same facts that precluded the successful assertion of the search as incident to arrest would have precluded its assertion. First, mobility was diffused by the seizure of the trunk by the police. Second, there was no diminished expectation of privacy in storing personal items in luggage.

125. Once the federal agents had seized it at the railroad station and had safely transferred it to the Boston Federal Building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained.

been stored in the vehicle. The Court's reasoning applies as strongly to the search of a container under the automobile exception as it did to the search incident to arrest theory. Although the *Chadwick* Court did not challenge the *Carroll* version of the automobile exception itself, it limited the exception by excluding those contents of an automobile in sealed and independently movable containers.

By recognizing that luggage is primarily used to hold "personal effects" (which are intended objects of fourth amendment protection),[126] the Court reconfirmed the holding of *Katz* that the fourth amendment protects people and their possessions when an owner manifests a legitimate expectation of privacy, even while in public.[127] There was no diminished expectation of privacy in the luggage placed in the automobile; the government did not show an exigency to justify the search.

The government in *Chadwick* did contend that the fourth amendment was only intended to protect the "core subjects" of the Constitution's prohibition against unlawful searches and seizures, namely, home, office and private communications.[128] Chief Justice Burger flatly rejected this attempt to fashion a general public-place exception to the warrant requirement.

A consistent application of the *Chimel* standards to containers did not occur, despite the compelling logic of *Chadwick*. In less than a decade, the Supreme Court repudiated almost all of the *Chimel-Chadwick* rationale. The first limitation of the *Chimel* control test was promulgated by the Supreme Court's emerging conservative majority in *United States v. Robinson*.[129] There the Court held a search of the person pursuant to a custodial arrest based upon probable cause is a reasonable intrusion under the fourth amendment so that no additional justification or exigency is necessary.[130] The Court extended that holding further still in finding that the *Chimel* control test need not be applied to the search of items associated with the person.[131] Application of the control test

---

Chadwick, 433 U.S. at 13 (footnote omitted). "Facilities were readily available in which the footlocker could have been stored securely . . . ." *Id.* at 4.

126. *E.g.*, United States v. Rothman, 492 F.2d 1260, 1265-66 (9th Cir. 1974) (search of luggage held invalid on *Chimel* grounds).

127. Katz v. United States, 389 U.S. 347, 351-52 (1967).

128. *Chadwick*, 433 U.S. at 6-7.

129. 414 U.S. 218 (1973).

130. *Id.* at 235.

131. *Id.* at 224. In that case, the police searched the suspect's breast pocket incident to arrest, yielding a crumpled cigarette pack containing heroin. *Id.* at 221-24. Under *Chimel*,

to an arrestee's person would preclude the search of a closed container once it is taken from the person and is in police control. To avoid that result, the Court has found that searches of the arrestee's person, unlike searches of items within the arrestee's reach, were not historically bound by notions of exigent circumstances. Instead, the justification for the search of the person, and the intrusion into containers taken from the person, flowed directly from the arrest. The search, therefore, need not be independently justified nor limited by notions of control.[132]

Another avenue of limiting the *Chimel* control test resulted in an extension of the justification of a search incident to arrest to virtually any time after the arrest so long as the arrestee remained in police custody. First, the Court upheld a search of an arrestee's clothes even though a substantial period of time had elapsed betweed the arrest and the search.[133] Later, in *Illinois v. Lafayette*,[134] Chief Justice Burger upheld a search similar to that disallowed in *Chadwick*, not incident to the arrest, but as an inventory search,[135] proving the Court's ingenuity at providing alternative justifications for avoiding the warrant process.[136]

Indeed, *Chimel* and *Chadwick* appear so eroded that there is serious doubt as to whether they continue to govern. The Supreme Court, in *New York v. Belton*,[137] abandoned the control test formulated in *Chimel* and enforced in *Chadwick*. There it upheld as incident to arrest the search of the entire interior passenger

---

once the package was removed from the arrestee's control, it could not be searched without a warrant. The Court was forced to draw a distinction between the two prongs of the search incident to arrest exception; search of the person was justified by traditional procedure. " The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation . . . ." *Id.* at 224.

" 'The right without a search warrant contemporaneously to search persons lawfully arrested . . . is not to be doubted.' " *Id.* at 225 (quoting Agnello v. United States, 269 U.S. 20, 30 (1925)). *See also* Gustafson v. Florida, 414 U.S. 260 (1973) (companion case to *Robinson* holding same).

132. *Robinson*, 414 U.S. 218, 225 (1973):

> Throughout the series of cases in which the Court has addressed the second proposition relating to search incident to a lawful arrest—the area beyond the person of the arrestee which such a search may cover—no doubt has been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee.

133. United States v. Edwards, 415 U.S 800, 806-08 (1974).

134. 462 U.S. 640 (1983).

135. *Id.* at 648 (inventory search of an arrestee's shoulder bag, yielding illegal amphetamines upheld as part of the routine booking procedure).

136. Justices Brennan and Marshall, concurring in the judgment, reiterated that the defendant's shoulderbag could not be searched incident to her arrest for disturbing the peace. *Id.* at 649 (Brennan, J., concurring).

137. 453 U.S. 454 (1981).

compartment of a vehicle and all containers located therein, even though the arrestees were disarmed and unable to reach or grab an item in the vehicle.[138] By allowing such a search, *Belton* measures control from the time immediately prior to the arrest itself, to when the driver still maintains dominion over the interior compartment of the vehicle and its contents.[139] *Belton* also assumes that the reach of control extends to the entire passenger compartment, even if reaching or grabbing an item in a particular part of the compartment would have been difficult or impossible to do while driving.[140] *Chimel*, on the other hand, looked to necessity to justify the warrantless search, and therefore properly measured control by the existing facts at the moment of the search.

2. *Under the Automobile Exception*

A warrantless search of a container found in an automobile is sanctioned today most easily and readily under the automobile exception to the warrant requirement. The exception appears to be open-ended, and the Court appears amenable to any request for its expansion. The existing doctrine leaves little question that in virtually every situation the police have the authority to substitute their own judgment for a magistrate's when the object to be searched is an automobile. A possible saving grace of the automobile exception is its requirement of independent probable cause; the police must believe that evidence of a crime will be found in the vehicle.[141] The point of contention is that the justifications which theoretically support the automobile exception are totally inapplicable to the search of containers found in an automobile. There is no emergency situation which would militate against securing a search warrant in either situation. The reasons traditionally asserted to justify the search of the vehicle, mobility and the reduced expectation of pri-

138. *Id.* at 456-57.

139. This is a less dramatic departure if you start with *Chambers* rather than *Chimel*, because under *Chambers* exigencies are balanced against privacy interests only at the moment that those interests are extinguished. This will generally occur when defendant still has possession of the car. *See supra* notes 81-82 and accompanying text.

140. *Cf. supra* note 117.

141. United States v. Ross, 456 U.S. 798, 823 (1982). "The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of a magistrate is waived; the search otherwise is as the magistrate could authorize." *Id.* The sole limitation upon the scope of a warrantless search under *Ross* is that the area searched must be capable of containing the object sought. *Id.* at 824. Therefore, for instance, a police officer would not be justified in searching the vehicle's glove compartment for the professed purpose of detecting illegal aliens which the vehicle was suspected of carrying.

vacy stemming from the pervasive regulation of vehicles capable of traveling on highways, are irrational when utilized to distinguish containers seized in searched vehicles from containers seized in other locales.[142] There is absolutely no greater reason to conduct a warrantless search of a container seized from an automobile than there is a container seized from any location.[143] Consequently, in the past five years, the Supreme Court has thoroughly reworked and rethought the exception in order to expand the exception to include containers.

The broad proposition suggested by *Chadwick* was adopted by a slight majority in *Arkansas v. Sanders*,[144] which held that the automobile exception does not extend to luggage found in the vehicle.[145] Although probable cause focused on the luggage before it was placed in the vehicle, the Court limited the exception to the vehicle itself.[146]

First, the Court distinguished *Chambers* holding that probable cause to believe that a container houses contraband justifies only the warrantless seizure and securing of the container.[147] A search must await issuance of a warrant. Second, the Court held that the occupant's diminished expectation of privacy while in a vehicle does not extend to containers found in the automobile.[148] Finally, the Court

142. *See* Arkansas v. Sanders, 442 U.S. 753, 764 (1979) (privacy associated with luggage is same whether luggage is in automobile or elsewhere).

143. *E.g.*, United States v. Chadwick, 433 U.S. 1, 7 (1977) (legitimate expectation of privacy in personal luggage worthy of fourth amendment protection); Arkansas v. Sanders, 442 U.S. 753, 763, 766 (1979) (extended protected privacy interest to containers in automobiles); Robbins v. California, 453 U.S. 420, 429-30 (1981) (Powell, J., concurring) (closed opaque containers manifest legitimate expectations of privacy). *See generally* Note, *A Reconsideration of the* Katz *Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977).

144. 442 U.S. 753 (1979).

145. "We therefore find no justification for the extension of *Carroll* and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police." *Id.* at 765.

146. "A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides . . . . Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken." *Id.* at 763 (footnotes omitted).

147. "We are not persuaded by the State's argument that, under Chambers v. Maroney, 399 U.S. 42 (1970), if the police were entitled to seize the suitcase, then they were entitled to search it." *Sanders*, 442 U.S. at 765 n.14. "We view . . . the seizure of a suitcase as quite different from the seizure of an automobile." *Id.*

> It is beyond question that the police easily could have obtained a warrant to search respondent's bag if they had taken the suitcase to a magistrate. They had probable cause to believe not only that respondent was carrying marihuana, but also that the contraband was contained in the suitcase they seized.

Id. at 764 n.12.

148. *Id.* at 761.

held that even though a container while in a vehicle may be as mobile as the vehicle itself, "the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control."[149] *Sanders* stressed that a warrantless search is unnecessary once the police have secured the container.[150] Arguably, warrantless searches of automobiles are justified by the greater difficulty in storing and safeguarding automobiles. This argument is rendered foolish by examining the facts of the automobile exception cases. Many involved delayed searches after the police had already removed and safeguarded the vehicles.[151]

Sanders was robbed of clarity by Justice Powell's assertion that only "worthy containers"[152] found in a vehicle are protected. Justice Powell provided examples of containers whose outward appearance divulge their contents,[153] but confusion resulted from his statement indicating the difficulty in determining which containers taken from a vehicle could be searched without a warrant and which were entitled to full protection under the fourth amendment.

That confusion was compounded in *Robbins v. California*[154] when a majority of the Court could not agree which containers were or were not entitled to the full protection of the warrant clause. The state contended that marijuana contained in two opaque plastic packages found during a warrantless search of the recessed luggage compartment of the rear of a station wagon was subject to the diminished expectation of privacy because it was an obvious method

149. *Id.* at 763 (footnote omitted).

150. *Id.* at 756.

151. *E.g.*, Florida v. Myers, 104 S. Ct. 1852, 1852 (1984); South Dakota v. Opperman, 428 U.S. 364, 366 (1976); Texas v. White, 423 U.S. 67, 67 (1975); Cady v. Dombrowski, 413 U.S. 433, 437 (1973); Cooper v. California, 386 U.S. 58, 58 (1967).

152. Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. . . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

Sanders, 442 U.S. at 764-65 n.13 (Powell, J., concurring) (citation omitted).

153. Items within actual or practical plain view because of their telltale outward appearance are not protected. *Id.*

154. 453 U.S. 420 (1981).

of packaging the contraband.[155] Although the proposition was rejected, a majority could not agree on the proper rationale. Justice Stewart wrote for a plurality and reasoned that the automobile exception did not apply to closed, opaque containers.[156] Justice Powell argued alone, again, for a worthy container rule[157] which would require a *Katz* expectation of privacy analysis of each container on a case-by-case basis.[158]

Sanders and *Robbins* represented the last attempts to limit the scope of the automobile exception. As long as the automobile exception rested upon the purported diminished expectation of privacy in a vehicle, a majority of the Court could not agree to an open-ended exemption which extended to containers as well as the vehicle itself. Even in an area not known for its reasoned opinions, enough Justices found it impossible to distinguish on privacy grounds between containers found in automobiles and those found elsewhere. The change in Court personnel following *Robbins*[159] resulted in another restatement of the basis for the automobile exception and the complete abandonment of the privacy rationale. In *United States v. Ross*,[160] a new majority substituted its more amorphous rationale, impracticability,[161] removing the barrier of reason which had prevented expansion of the exception to containers found in the vehicle when the exception rested upon expectations of privacy. Similarly, the Court no longer looked to necessity to determine whether a warrantless search of containers found in a vehicle was permissible. Justice Powell argued in *Sanders* that the state had never demonstrated the necessity for a warrantless search of

155. *Id.* at 274.

156. *Id.* at 428.

157. *Id.* at 432-33 (Powell, J., concurring). No other Justice ever subscribed to Justice Powell's "worthy container" argument.

158. Chief Justice Burger concurred in the judgment without joining in any of the opinions. *Id.* at 429 (Burger, C.J., concurring). The lack of insight into Burger's position on this issue made *Robbins* all the more dubious and United States v. Ross, 454 U.S. 798 (1982), which followed, less surprising.

159. Justice Stewart, the author of the plurality opinion in *Robbins*, and one of the principal advocates of strict limitations upon exceptions to the warrant requirement, retired at the end of the term, days after delivering his opinions in *Robbins* and New York v. Belton, 453 U.S. 454 (1981). On Friday, September 25, 1981, Associate Justice Sandra Day O'Connor was sworn in as Stewart's replacement.

160. 454 U.S. 798 (1982).

161. *Id.* at 820-21. *See supra* notes 102-09, 151-53 and accompanying text. The new majority consisted of the dissenters in *Robbins* (Blackmun, Rehnquist and Stevens), Chief Justice Burger (whose silent concurrence in *Robbins* may have been illustrative of his ambiguous position on this issue), and Justices O'Connor and Powell (whose reluctant concurrence in *Robbins* made his shift hardly surprising).

luggage taken from an automobile.[162] The exception was automatically extended to all containers when *Ross* held that a search sanctioned under the automobile exception is as broad as one authorized by warrant.[163] Thus, all containers which could house the item sought may be searched.[164] Justice Stevens' view of the breadth of warrantless searches imperils all remaining limitations.

Early in its development the analytical framework for the search of containers found in vehicles under the automobile exception adhered to fourth amendment principles. The early cases properly focused their fourth amendment treatment on the containers themselves and the suspect's legitimate expectation of privacy in them. Now, that framework has been manipulated by the Supreme Court to a point where the automobile and its contents are functionally one and the same. Recent cases evince a readiness to ignore distinctions, declaring in *Ross*, that a search under the automobile exception may be as broad as a search with a warrant, extending to all parts of an automobile and all containers therein. This clear trend repudiates the Court's own principle that the initial intrusion and the scope of a search are not the same and must be justified on separate grounds.

II. The 1985 Automobile Exception Decisions

The 1985 automobile exception cases are remarkable: in *Castleberry*, a tie vote affirming a lower court decision, there is no opinion; in *Johns*, where seven members of the Court joined the majority opinion, the Court offered no plausible rationale for its decision; and in *Carney*, the rationale put forth resurrected one put to rest only three years earlier. Two trends emerge from these cases. First, there is no doctrinal support for the anomalous treatment accorded automobile searches, and second, the Supreme Court majority at times does not even risk attempting to fashion doctrinal support for its automobile exception decisions.

A. California v. Carney

In *Carney* the automobile exception met and mastered the spe-

162. "We conclude that the State has failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles." Arkansas v. Sanders, 442 U.S. 753, 763 (1979).

163. "We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant." *Ross*, 456 U.S. at 825.

164. *Id.*

cial privacy interest normally recognized in a dwelling.[165] In answering the reasoned approach of the California Supreme Court,[166] the United States Supreme Court ignored its own conclusion in *Ross* that the rationale of the reduced expectation of privacy attendant upon vehicles was unreasoned and no longer applicable.[167] The Court applied only one narrow prong of its automobile privacy rationale to reach this result.[168] *Carney* stands as an example of the lengths the Court appears willing to go in order to fit more warrantless searches within the rubric of the automobile exception.

A Drug Enforcement Administration (DEA) agent received an uncorroborated tip that a person was exchanging marijuana for sex in a motor home parked on a San Diego street.[169] The agent observed the defendant approach a youth and accompany him to a Dodge Mini Motor Home parked in a nearby lot.[170] The defendant and the youth drew all of the window shades in the motor home, including a shade covering the front windshield.[171] The motor home was kept under surveillance for a short time by DEA

165. Ordinarily, the highest fourth amendment protection extends to anything acting as a home or residence. In what has become the classic example of this concept, Justice Brennan in Miller v. United States, 357 U.S. 301, 307 (1958), quoted William Pitt's remarks made during a Parliamentary debate on searches incident to the enforcement of an excise tax on cider:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; it's roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshhold of the ruined tenement.

See also United States v. United States District Court, 407 U.S. 297, 313 (1971) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."); United States v. Nelson, 459 F.2d 884, 885 (6th Cir. 1972) ("The concept that a man's home is his castle is an ancient one. It has had a profound effect upon our legal history. Its application to the innocent and guilty, the rich and the poor is no figment of the imagination of modern-day judges.").

166. People v. Carney, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983).

167. California v. Carney, 105 S. Ct. 2066, 2069 (1985).

168. The privacy analysis typically involves a three-prong test. *See* Arkansas v. Sanders, 442 U.S. 753, 761 (1979). First, the court looks to the "use," that is, whether the area searched is employed in such a way as to indicate an expectation of privacy. The second prong involves "configuration," that is, whether the object is so configured or structured as to indicate a privacy expectation. The third prong of the privacy test asks whether the object is so "pervasively regulated" that it indicates little expectation of privacy. In *Carney*, the Court applied only the pervasive regulation prong. The Court could not employ the use prong because one has high expectations of privacy in a vehicle utilized as a home. Moreover, the configuration prong of the test runs counter to the Court's argument since a mobile home with blinds drawn admits no diminished expectation of privacy.

169. *Carney*, 105 S. Ct. at 2067.

170. *Id.*

171. *Id.*

agents.[172] The youth then left the motor home and was stopped by the agents.[173] The young man told the agents that the defendant had given him marijuana in exchange for sex.[174] At the direction of the DEA agents, the young man returned to the mobile home and knocked on the door.[175] The defendant stepped out of the mobile home and was immediately arrested.[176] One agent entered the mobile home and observed marijuana and related items on a table.[177] The mobile home was seized and transported to a police station where a second warrantless search uncovered additional marijuana in cupboards and the refrigerator.[178]

The California Supreme Court reversed the conviction, holding that the automobile exception is inapplicable to a motor home.[179] After reviewing the automobile exception cases from *Carroll* to *Ross*, the California court concluded that the mobility discussed in *Carroll* and relied upon in the later cases could not possibly be the sole basis for allowing warrantless searches of immobilized vehicles. Consequently, this court relied upon post-*Carroll* and pre-*Ross* rationales of the United States Supreme Court in determining that "the diminished expectation of privacy which surrounds the automobile"[180] is the basis for distinguishing between warrantless searches of residences and vehicles. The California court ruled that the principal function of the motor home was to provide living quarters and therefore was not properly subject to the diminished expectation of privacy normally attendant upon automobiles.[181] The court concluded: "For these reasons, it is entitled to a degree of protection similar to that accorded an Englishman's cottage, or 'ruined tenement'."[182]

The California court acknowledged that the motor home could properly be the subject of a warrantless search under another exception to the warrant requirement, such as if exigent circumstances

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Carney*, 34 Cal. 3d at 610, 668 P.2d at 814, 194 Cal. Rptr. at 507.

180. *Id.* at 605, 668 P.2d at 811, 194 Cal. Rptr. at 504 (citing United States v. Chadwick, 433 U.S. 1, 12 (1977)); People v. Minjares, 24 Cal. 3d 410, 418, 591 P.2d 514, 519, 153 Cal. Rptr. 224, 227-28 (1979).

181. *Carney*, 34 Cal. 3d at 607-08, 668 P.2d at 812-13, 194 Cal. Rptr. at 505-06.

182. *Id.* at 607, 668 P.2d at 812, 194 Cal. Rptr. at 505.

could be established.[183] On that basis the court proceeded to review the state's claim that the original intrusion was a protective sweep of the premises to look for other suspects who might pose a threat to the arresting officers or who might seek to destroy evidence located in the motor home.[184] Applying the normal constitutional rule that the party seeking exemption from fourth amendment procedures bears the burden of justifying the warrantless intrusion, the California Supreme Court concluded that the state failed to show articulable facts from which the officers could reasonably have inferred that other suspects were in the motor home.[185]

The United States Supreme Court reversed and held that a motor home is subject to search under the automobile exception. A mobile home is not to be treated like a residence for fourth amendment purposes.[186]

Retreating somewhat from the Court's strident position advanced in *Ross* in 1982, Chief Justice Burger stated that "[t]he capacity to be 'quickly moved' was clearly the basis of the holding in *Carroll*, and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception."[187] Of course, all of the post-*Carroll* cases cited as support for this proposition involved cases in which the Court was sanctioning either delayed searches or searches of immobilized vehicles.[188] Since the California court had questioned the applicability of mobility as a factor for the warrantless search of an immobilized vehicle, the Chief Justice resurrected the diminished expectation of privacy as secondary grounds in support of the automobile exception,[189] a complete reversal from the position advanced in *Ross* only three

183. *Id.* at 610, 668 P.2d at 814, 194 Cal. Rptr. at 507.

184. *Id.* at 610-13, 668 P.2d at 814-16, 194 Cal. Rptr. at 507-09.

185. *Id.* at 612, 668 P.2d at 816-17, 194 Cal. Rptr. at 508-09.

186. *Carney*, 105 S. Ct. at 2071 n.3.

> We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

Id.

187. *Id.* at 2069.

188. South Dakota v. Opperman, 428 U.S. 364, 366 (1976) (search at impound lot); Cardwell v. Lewis, 417 U.S. 583, 588 (1974) (exterior of car examined at impound lot); Cady v. Dombrowski, 413 U.S. 433, 437 (1973) (delayed search at private garage); Chambers v. Maroney, 399 U.S. 42, 43 (1970) (search of automobile while driven to police station); Cooper v. California, 386 U.S. 58, 58 (1967) (search of automobile one week after impounding).

189. *Carney*, 105 S. Ct. at 2069.

years earlier. The *Ross* Court retreated because the privacy rationale simply would not allow the extension of the automobile exception to containers found in a vehicle.[190] The Court rejected the privacy rationale in *Ross*, only to return to it again in *Carney*. In support of treating the mobile home as a vehicle rather than a dwelling, the Court applied only one prong of the revived privacy analysis.[191] The majority stated that every vehicle is subject to pervasive regulation inapplicable to a fixed dwelling.[192] In finding this reduced expectation of privacy the Court failed to apply the principal tests which accompany any privacy analysis: the type of facility, conduct normally conducted in such a setting,[193] and the steps taken by the occupants to protect their privacy. The Court claimed such distinctions would require the differentiation between "worthy" and "unworthy" vehicles, an analysis which Chief Justice Burger claimed was rejected in *Ross*.[194] Underlying the application of only part of the privacy test was the poorly established assumption that automobiles are subject to more pervasive regulation than residences. Traffic codes are not necessarily more complex than building and housing codes. In some communities, homes, not motor vehicles, are subject to more comprehensive and intrusive periodic state health and safety inspections.[195]

Even though it ignored the holding eliminating the reduced expectation of privacy, the Court returned to *Ross* to use the exigency of an automobile's mobility and the attendant impracticability of securing a warrant to justify the warrantless search. The Court again spoke of actual, rather than inherent, mobility,[196] but it added no additional meaning or greater understanding because the decision failed to differentiate between the initial search on the street and the second, delayed search at the police station. The Court stressed that even though the mobile home possessed some attrib-

190. *See supra* notes 107-09 and accompanying text.

191. *See supra* note 47.

192. *Carney*, 105 S. Ct. at 2069 (citing Cady v. Dombrowski, 413 U.S. 433, 440-41 (1973)).

193. *E.g.*, Oliver v. United States, 104 S. Ct. 1735, 1741-43 (1984) (whether setting was used for "intimate activities" is factor in determining whether society recognized a privacy interest).

194. *Carney*, 105 S. Ct. at 2070.

195. *See supra* note 101.

196. *Carney*, 105 S. Ct. at 2070:

> [T]he vehicle falls clearly within the scope of the exception laid down in *Carroll* and applied in succeeding cases. Like the automobile in *Carroll*, respondent's motor home was readily mobile. Absent the prompt search and seizure, it could readily have been moved beyond the reach of the police.

utes of a conventional home, its presence on the street, its ready mobility and the "pervasive schemes of regulation"[197] affecting all automotive traffic resulted in a diminished expectation of privacy.

The automobile exception has travelled far from the "grave emergency"[198] of exigent circumstances to general impracticability. Throughout that journey the Supreme Court has thwarted the interests protected by the fourth amendment. Even though the Court previously rejected mere police inconvenience as an inadequately protective standard,[199] the current standard, presumed impracticability, without even a showing of actual impracticability, is far more lax. The current standard derives from a mentality that admits no value in the prior judicial approval involved in the warrant process and is unconcerned about controlling the exercise of police discretion. This mentality finds a police officer's assessment of probable cause to be an adequate alternative to a magistrate's warrant, a clear repudiation of central fourth amendment values.

In *Carney*, the Court justifies the automobile exception on a diminished expectation of privacy that occurs in automobiles and the presumed impracticability of obtaining a warrant before searching a mobile home. Pervasive regulation is offered as an explanation of the privacy rationale, yet it fails to demonstrate a coherent relationship between warrantless searches and license tags, worn tires and broken headlamps.[200] Impracticability is based on the inherent mobility of automobiles. This falls on the failure to distinguish between roadside searches and delayed searches at impound lots or police headquarters. So long as these inexplicable rationales persist, the warrant requirement generally, not just as it pertains to automobiles, is at risk. The skepticism about the value of warrants demonstrated in the automobile exception cases must ultimately spill over and affect the Court's consideration of the warrant requirement in all contexts. Even homes may not be immune from this reasoning.

---

197. *Id.*; *see also* Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (lower expectation of privacy due to extensive regulation and greater number of police-citizen contacts concerning automobiles).

198. McDonald v. United States, 335 U.S. 451, 455 (1948).

199. "No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement. . . ." *Id.*

200. Moreover, a homeowner must observe zoning requirements, pay property taxes, and keep his residence up to code standards; yet no one would suggest that these regulations result in a lower expectation of privacy.

B. Oklahoma v. Castleberry

In *Oklahoma v. Castleberry*,[201] the Supreme Court affirmed a limitation on the automobile exception that appears unstable because of the tie vote as well as the rapidity with which other limitations have fallen. This limitation appears absurd on its face when considered in the context of the current scope of the automobile exception. Although this limitation is in need of modification, it is nonetheless more consistent with fourth amendment principles than the remainder of the case law defining the scope of the automobile exception.

A confidential informant notified Oklahoma City police that two men who were staying at a named motel and driving a blue Thunderbird bearing Florida license plates were carrying narcotics in blue suitcases.[202] Acting pursuant to the tip, an officer proceeded to the motel, observed the described car and confirmed with the desk clerk that a room was rented to someone named Castleberry.[203] The appellants then left the motel room and placed several suitcases in the trunk of the vehicle.[204] The officer identified himself and approached the two men, carrying his badge in one hand and his gun in the other.[205] The officer ordered the appellants to place their hands on the top of the automobile. One complied, but Castleberry resisted, closing the trunk, throwing a small white object into the car and then shutting and locking the car door.[206] Back-up assistance arrived and opened the trunk of the car with keys removed from the door.[207] The officers searched the suitcases found in the trunk and discovered narcotics.[208] The officers also searched the interior of the car and discovered the small white object, a Band-Aid box, containing cocaine.[209]

The state argued that the search of the suitcases found in the trunk of the car and the Band-Aid box found in the passenger compartment of the vehicle were justified either as incident to a lawful arrest or under the ubiquitous automobile exception.[210] The

201. 105 S. Ct. 1859 (1985).

202. Castleberry v. State, 678 P.2d 720, 722 (1984), *aff'd mem. per curiam by an equally divided court*, 105 S. Ct. 1859 (1985).

203. *Castleberry*, 678 P.2d at 722.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 723.

Oklahoma Court of Criminal Appeals found both contentions groundless. At the time the suitcases and the interior of the car were searched, both arrestees were restrained.[211] The car doors and trunk were locked, and there was no danger that the arrestees could obtain a weapon or evidence from the interior of the vehicle.[212] As to the automobile exception, the Oklahoma court found as controlling, the limitation to the exception, formulated in *Sanders* and retained in *Ross*, that the authority to conduct a warrantless search does not apply to situations where probable cause exists to search a specific container before it is placed in the vehicle. The officers were only entitled to seize the suitcases and Band-Aid box while a search warrant was obtained.[213] An evenly divided United States Supreme Court affirmed the decision without opinion.[214]

Given the considerable blurring that has befallen the *Chimel* standard, it was not surprising that the State of Oklahoma suggested that the search of the suitcases placed in the trunk of the vehicle and the Band-Aid box thrown into the interior of the automobile was incident to the suspects' arrest.[215] Several factors suggested to state authorities that this alternative ground to the automobile exception would be accepted by the Supreme Court. The central question presented was whether control would be measured at the moment that the officers sought to intercept the defendants. At that time, the Band-Aid box was in hand and the suitcases within grabbing distance. Had the Band-Aid box been secured by the officer and searched simultaneously with the arrest, there is little doubt that the Court would have upheld the search as incident to the arrest. In that case, police would have had exclusive control of neither the arrest situation nor the Band-Aid box.[216] While the same argument could be made regarding the suitcases, it would be

211. *Id.*

212. *Id.*

213. *Id.* at 724.

214. *Castleberry*, 105 S. Ct. at 1859.

215. *See* Brief for Petitioner State of Oklahoma in Support of Petition for Certiorari at 13-14, Oklahoma v. Castleberry, 105 S. Ct. 1859 (1985) [hereinafter cited as Brief for Petitioner].

In his dissent in United States v. Chadwick, 433 U.S. 1, 23 (1976), Justice Blackmun suggested an alternative ground for the search. He suggested that the footlocker could have been searched incident to the suspects' arrest when the footlocker sat in the open trunk of the stationary automobile. Perhaps such logic could have been applied to the *Castleberry* situation to justify the search as incident to arrest. However, in *Castleberry*, the items were locked in a trunk, and once the officer obtained the keys, the items were not under the suspects' control. Brief for Petitioner, at 8-9.

216. When, as in *Castleberry*, the police have control of the package as well as control of the arrest situation, no justification for foregoing the warrant requirement exists.

more tenuous. It was not necessary that the officer possess the suitcases to ensure that the arrestees were deprived of their control. In fact, a search of the suitcases during the moments surrounding the arrest would have distracted the officer from assuring his own safety by attending to the evidence rather than the arrestees. A search at that moment would not serve the societal purposes which permit a warrantless search incident to arrest. Instead, a contemporaneous search would have detracted from those purposes as in *Belton*. There, the four suspects' most opportune moment to escape or threaten the single arresting officer presented itself when the officer turned his attention from the suspects to search the automobile.[217]

The difficulty with *Castleberry* is that once the officers finally subdued the suspects, the Band-Aid box was locked behind the automobile's doors. Although the Band-Aid box might have been legitimately searched a moment earlier, once it was locked in the automobile, it was beyond the suspects' control. *Belton* would not apply because the arrestees were not recent occupants of the automobile. *Belton* does not apply, that is, unless it altered the *Chimel* control test in general, rather than merely devising a test that applies just for searches following the arrests of recent occupants of automobiles.

The Supreme Court's four-four tie vote affirming the Oklahoma court's rejection of the state's position hardly provides meaningful guidance in this area. It is too easy to dismiss *Belton* as relevant only to automobiles, despite Justice Stewart's admonishment that the case was just that.[218] There is no conceivable justification for a separate rule that extends search incident to arrest to the interior compartment of an automobile once an arrestee is deprived of control but not to any other location. The ability to lock the doors of the compartment provides support for the opposite rule. It appears easier to deprive an arrestee of the opportunity to reach or grab into the interior compartment of a vehicle than it is to deprive him of reaching or grabbing opportunities in most other settings. *Belton* may be the first step of an as-of-yet incomplete redrafting of the *Chimel* control test. *Belton* is not the only generalization adopted by the Court in this decade which results in the removal of limita-

217. New York v. Belton, 453 U.S. 454 (1981). After ordering the suspects from the car, the arresting officer patted down the four men and directed them to four separate locations on the highway. *Id.* at 456.

218. "Our holding today does no more than determine the meaning of *Chimel*'s principles in this particular and problematic context [the automobile]." *Id.* at 460 n.3 (Stewart, J., dissenting).

tions upon searches incident to arrest.[219] It may very well be the first step to the adoption of a general rule further enhancing police authority following arrests outside of the home.

Reviewing *Castleberry* as an automobile exception case reveals the one imperiled limitation that the Court left in *Ross* by failing to overrule *Sanders*.[220] Police still may not rely upon the broad warrant exemption for automobiles to search containers found in a vehicle when the probable cause focused upon the containers prior to being placed in the automobile.[221] The narrow vote in *Castleberry* would indicate that this limitation will soon fall to the unrelenting expansion of the automobile exception.

C. United States v. Johns[222]

Johns is one in what is now a long line of examples where law enforcement officers have elected to bypass the warrant process and conduct a search without prior judicial approval and without any conceivable need to do so. It is also typical of a lengthening line of cases in which the Supreme Court has ratified the police decision, thereby relegating the warrant process in searches taking place outside of homes and offices to an historical anachronism.

During a United States Customs investigation of suspected drug smugglers, two pickup trucks were observed by ground and air surveillance travelling to a remote private airstrip in Arizona not far from the Mexican border.[223] Soon after the arrival of the pickups at the airstrip two small planes landed and departed after rendezvousing with the occupants of the trucks.[224] The Customs officers approached the trucks and observed several sealed boxes and plastic bales inside smelling of marijuana.[225] The officers arrested the five

219. *See* Washington v. Chrisman, 455 U.S. 1, 7 (1982) (holding that an arresting officer has the unfettered right to remain at the side of an arrestee, even if the officer does so for reasons other than to protect himself or to deny the arrestee access to evidence).

220. "Although we have rejected some of the reasoning in *Sanders*, we adhere to our holding in that case . . . ." United States v. Ross, 456 U.S. 798, 824 (1982).

221. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them. Accordingly, the reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police from automobiles. We therefore find no justification for the extension of *Carroll* and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police.

Arkansas v. Sanders, 442 U.S. 753, 764-65 (1979) (footnote omitted).

222. United States v. Johns, 105 S. Ct. 881 (1985).

223. *Id.* at 883.

224. *Id.*

225. *Id.*

defendants present at the scene and seized the boxes and bags from the trucks.[226] The Customs officers then took the trucks to DEA headquarters and removed the bales, placing them in a warehouse. Three days later, still without a search warrant, officers opened the bales and found marijuana.[227]

The government contended that the warrantless search of the wrapped bales could be supported either under the plain view exception[228] or the automobile exception to the warrant requirement. The trial court suppressed the evidence, and the decision was affirmed by the court of appeals for the Ninth Circuit. The court of appeals concluded that the officers were entitled to search the vehicles under the rules of the automobile exception set forth in *Ross*, which permits a search of the vehicle at the scene or shortly thereafter. The court of appeals held that the exception did not justify a warrantless search of a container no longer in an automobile and secured by the police three days prior to the warrantless search.[229]

The United States Supreme Court reversed and upheld the search on the theory that it would be of little benefit to the person whose property was searched nor would it promote fourth amendment interests to limit the automobile exception to searches at the scene or shortly thereafter.[230] The Court concluded that a delayed search, even one delayed by three days, was not necessarily unreasonable.[231]

In *Johns*, the Court reached a low in opinion craftmanship. The majority opinion relied upon *Carroll*, *Ross* and three earlier *per curiam* decisions[232] which also extended the automobile exception

226. *Id.*

227. *Id.* at 884.

228. United States v. Johns, 707 F.2d 1093, 1095 (9th Cir. 1983), *rev'd*, 105 S. Ct. 881 (1985). The plain view doctrine as applicable to automobiles is ellucidated in Texas v. Brown, 460 U.S. 730, 744 (1983) (officer conducting routine driver's license check observed balloons and vials of white powder in defendant's car; held, seizure of these items lawful because they were in plain view of officer lawfully in position to see the contraband).

229. *Johns*, 707 F.2d at 1100.

230. *Johns*, 105 S. Ct. at 886.

231. *Id.* at 887.

232. In Texas v. White, 423 U.S. 67, 68 (1975) (per curiam) (holding that if probable cause to search car at scene exists, such probable cause still exists shortly thereafter at police station), the Court, while relying on *Chambers* to justify the search, ignored the facts in *Chambers* which made a subsequent warrantless search at the station reasonable. In Michigan v. Thomas, 458 U.S. 259, 261 (1982) (per curiam) (involving the inventory search of car towed, after its occupants were arrested), the Court, while denying that immobilization of the car has any effect on the warrantless search, simply cited *Texas v. White* and *Chambers* for support. In Florida v. Meyers, 104 S. Ct. 1852, 1853 (1984) (per curiam) (involving police entry into a locked, secure impound area eight hours after owner's arrest to conduct warrant-

without advancing reasons for the extensions. *Ross* was based upon the general impracticability of securing a search warrant prior to the search of vehicles and their contents.[233] Thus, the rationale of *Ross* is absolutely irrelevant to *Johns*, where the government could not show need, slight inconvenience or indeed any semblance of impracticability to justify foregoing a warrant before searching a container safely secured for three days.

Justice O'Connor's reasoning in *Johns* is typical of the shift in fourth amendment analysis which now prevails in the Supreme Court. The analysis requires that the one who would maintain the status quo and preserve existing fourth amendment protection must bear the burden of demonstrating how that furthers fourth amendment interests.[234] Formerly, the burden rested upon the party seeking exemption from the warrant requirement to demonstrate a need to bypass normal constitutional procedures.[235] *Johns* builds where *Ross* left off, indicating that the automobile exception's breadth is inexhaustible. Allowing the search three days after the seizure while the packages were safely stored in a government facility indicates that time limitations upon warrantless searches no longer exist. The scope of such searches is limitless, no longer linked in any way to the societal need which originally justified the exception's existence. The Court in *Ross* held that a search under the automobile exception is as broad as a search authorized by a magistrate.[236] Then, the Court in *Johns* authorized delayed warrantless searches of a vehicle's contents without requiring the government to show

---

less search), the Court again merely cited to *Thomas* and *Chambers* for the proposition that "the justification to conduct . . . a warrantless search does not vanish once the car has been immobilized."

233. United States v. Ross, 456 U.S. 798, 820 (1982).

234. *Cf.* United States v. Leon, 104 S. Ct. 3405 (1984), where the majority held that proponents of the exclusion of evidence should demonstrate how that remedy promotes fourth amendment rights.

> [T]he argument that defendants will lose their incentive to litigate meritorious Fourth Amendment claims as a result of the good-faith exception we adopt today is unpersuasive. Although the exception might discourage presentation of insubstantial motions, the magnitude of the benefit conferred on defendants by a successful motion makes it unlikely that litigation of colorable claims will be substantially diminished.

Id. at 3422 n.25.

The assignment of the burden of proof can be issue determinative. This is very different from placing the burden of proof upon the individual or agency seeking a court's sanction for failing to secure a warrant in a particular fact situation. There, the individual or agency can rely upon the facts in attempting to demonstrate the need for bypassing the warrant process.

235. *See* McDonald v. United States, 335 U.S. 451, 456 (1948) (those seeking exemption from warrant requirement must show need for exemption).

236. United States v. Ross, 456 U.S. 798, 825 (1982).

any reason whatsoever for the delay or the failure to secure a magistrate's prior authorization. Consequently, the failure to secure a warrant for a delayed search does not even require a showing of inconvenience.

III. THE IMPORT OF THE 1985 DECISIONS

The automobile search cases of 1985 signified more than the mere expansion of the already general exemption granted to automobiles from the fourth amendment's warrant requirement. After all, the two cases—*Johns* and *Carney*—in which the Supreme Court upheld warrantless intrusions under the automobile exception had next to nothing to do with automobiles. Moreover, the decision in *Castleberry* cannot be read as an endorsement of limitations on the automobile exception.

The use of the automobile exception as the framework in which to decide these cases was only a matter of convenience. By the time the officers in *Johns* opened and inspected the contents of the packages stored in the DEA warehouse, the packages' link to the trucks was merely a matter of historical curiosity. Similarly, in *Carney*, the critical fact is not that the search was of a mobile home parked on a public street. The search invaded an entity recognized as a home, a clearly recognized privacy interest,[237] but located in an area not normally used to conduct housekeeping. There is no escaping the California court's conclusion that it was a home despite its being on wheels.[238] Moreover, the Supreme Court did not

237. As the dissenters in *Carney* wrote: "[T]he place to be searched plays an important role in Fourth Amendment analysis. . . . The California Supreme Court correctly characterized this vehicle as a 'hybrid' which combines 'the mobility attribute of an automobile . . . with most of the privacy characteristics of a house.' " California v. Carney, 105 S. Ct. 2066, 2071 (1985) (Stevens, J., dissenting) (footnotes omitted) (quoting in part, People v. Carney, 34 Cal. 3d 597, 606, 668 P.2d 807, 812, 194 Cal. Rptr. 500, 505 (1983)). *See also* Segura v. United States, 104 S. Ct. 3380, 3389 (1984) ("The sanctity of the home is not to be disputed. But the home is sacred in Fourth Amendment terms not primarily because of the occupant's possessory interests in the premises, but because of their privacy interests in the activities that take place within.").

238. The California Supreme Court found that:

> [f]irst and foremost, unlike an automobile the primary function of a motor home is not transportation. Motor homes are generally designed and used as residences; their essential purpose is to provide the occupant with living quarters. . . . The motor home at issue here . . . created a setting that could accommodate most private activities normally conducted in a fixed home. The configuration of the furnishings, together with the use of the motor home for all manner of strictly personal purposes, strongly suggests that the structure at issue is more properly treated as a residence than a mere automobile.

People v. Carney, 34 Cal. 3d 597, 606-07, 668 P.2d 807, 812, 194 Cal. Rptr. 500, 505 (1983) (footnote omitted).

choose to distinguish between the immediate search on the street and the delayed search at the police station. At least with the first search, the Court could have disputed the California Supreme Court's finding and contrived exigent circumstances.[239]

In all three 1985 automobile exception decisions, there was absolutely no need for a warrantless search.[240] The packages seized in *Johns* were stored for three days by law enforcement officers in a law enforcement facility maintained for secure storage. In *Carney*, the motor home was safely and exclusively under police control once the defendant exited the vehicle and once the youth presumably assured the police that no one else was inside. To rationalize either search through the automobile exception is to disguise what the Court is actually doing. Claiming that an automobile was at some time or another involved does not explain, let alone justify, disregard of the constitutional principle that warrants are the only way to protect the privacy of the innocent as well as the guilty. As recently as 1979 the Court itself acknowledged that the incidental involvement of an auto does not justify ignoring the warrant requirement.[241] The Court continues to act as though the word "au-

239. The California Supreme Court stated: "The underlying rationale for the protective sweep doctrine is, of course, the exigent circumstances exception to the warrant requirement." *Id.* at 612, 668 P.2d at 816, 194 Cal. Rptr. at 509. The court found that the requisite exigencies did not exist because the letter which tipped off the police was uncorroborated. The reference to the would-be accomplice did not place him inside the motor home. The mobile home had been under surveillance for an hour, during which time only the defendant and the youth had been observed going in or coming out. Further, none of the arresting officers testified that they had subjectively believed that others were inside. *Id.* at 612-13, 668 P.2d at 816, 194 Cal. Rptr. at 509.

It is conceivable that the United States Supreme Court might have made a more plausible justification for the search had they focused on the exigencies surrounding the sweep search rather than the implausible, hybrid application of an automobile exception analysis. By simply finding the California Court's exigency analysis erroneous, the setting of a dubious precedent could have been avoided.

240. At the time of the searches in all three cases, the suspects were in police custody, thus eliminating any threat to the evidence of the type which might justify an on-the-spot warrantless search. In *Johns*, the contraband was safely secured in a DEA warehouse at the time of the search. United States v. Johns, 105 S. Ct. 881, 884 (1985). In *Carney*, the motor home was impounded at the time of the second search. California v. Carney, 105 S. Ct. at 2066, 2067 (1985). The California Supreme Court rejected any contention by the state that the first search was a sweep for others in the mobile home. People v. Carney, 34 Cal. 3d 597, 610-13, 668 P.2d 807, 814-17, 194 Cal. Rptr. 500, 507-10 (1983). In *Castleberry*, the suspect had been subdued at the time of the car search. Castleberry v. State, 678 P.2d 720, 722 (1984).

241. Arkansas v. Sanders, 442 U.S. 753, 763-64 (1979):

> We conclude that the State has failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles. . . . Accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.

tomobile" has a mesmerizing effect and that the involvement of a vehicle anywhere in the process is sufficient explanation for the disregard of orderly constitutional procedures. Mere repetition is being offered as a substitute for reason.

The most recent cases stand for very little other than to reinforce certain truisms established in previous automobile cases. The constantly shifting arguments offered in support of the automobile exception do not explain in any way a vehicle's total exemption from the warrant requirement. The *John*'s opinion minimized mobility. It had to do so to uphold a search of the packages three days after their seizure. Instead, the majority relied upon the vague rubric of impracticability and three earlier *per curiam* opinions,[242] none of which offered an explanation or justification for their expansion of the automobile exemption. The *Carney* majority, on the other hand, returned to and stressed mobility because the motor home met all the privacy expectations ordinarily associated with a residence. Chief Justice Burger also revived the reduced expectation of privacy because the mobile home is subject to the pervasive regulation of vehicles capable of travelling on highways. Pervasive regulation, however, does not justify ignoring the privacy expectations ordinarily associated with living arrangements, and the privacy argument was a feeble and ineffective response to the California court's analysis of the issue.[243] Mobility works neither to justify the extreme delay in *Johns* nor to overcome the normal expectation of privacy associated with living arrangements in *Carney*. Moreoever, just as the Court has not explained why regulation of automobiles overcomes privacy interests in trunks and locked glove compartments it did not explain how regulation diminished the privacy interest in a mobile home.

Mobility cannot be used to understand the Court's differing treatment of personal effects seized from an automobile and those effects seized in any other public setting. In the latter case, the police must secure a warrant before searching the effects. In the former, there can be a three-day impounding prior to a still warrantless search. Nor does mobility serve to distinguish a vehicle from any container found in a vehicle.[244] There is no constitutionally relevant way that a suitcase is less mobile than an automobile.

242. Florida v. Myers, 104 S. Ct. 1852 (1984); Michigan v. Thomas, 458 U.S. 259 (1982); Texas v. White, 423 U.S. 67 (1975). *See supra* note 232 and accompanying text (for a discussion of per curiam opinions).

243. *Supra* note 200 and accompanying text.

244. *Supra* notes 112-64 and accompanying text.

The mobility rationale, however, is not totally without value. It serves, as it did in *United States v. Carroll* sixty years ago, to explain why an automobile stopped on a public highway may sometimes be searched without a warrant. The mobility of the vehicle created the exigent circumstance which in *Carroll* served as the legitimate societal interest which excused the investigating officers from obtaining a warrant prior to conducting the search. Had the officers delayed the search to obtain a warrant the opportunity to search would have been irretrievably lost. Recent cases have substituted inherent mobility, somehow upholding searches in *Johns* after a three-day delay and in *Carney* after police had control of the vehicle and moved it to the police station. Inherent mobility, it seems, has given way to an even vaguer and less limiting term, general impracticability.[245]

General notions about the difficulty of towing and safekeeping an automobile[246] while a warrant is sought may, upon superficial analysis, lead to acceptance of an argument that general impracticability supports the warrantless search of automobiles.[247] This argument is based upon a generality which may apply in a remote desert[248] but, if applied uniformly, has the effect of curtailing consti-

245. "Thus, since its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods." United States v. Ross, 456 U.S. 798, 806 (1981) (footnote omitted).

246. In *Chambers*, if the Court had required seizure and holding of the vehicle, it would have imposed a constitutional requirement upon police departments of all sizes around the country to have available the people and equipment necessary to transport impounded automobiles to some central location until warrants could be secured. Moreover, once seized automobiles were taken from the highway the police would be responsible for providing some appropriate location where they could be kept, with due regard to the safety of the vehicles and their contents, until a magistrate ruled on the application for a warrant. Such a constitutional requirement therefore would have imposed severe, even impossible, burdens on many police departments. *See* Note, *Warrantless Searches and Seizures of Automobiles*, 87 Harv. L. Rev. 835, 841-42 (1974). No comparable burdens are likely to exist with respect to the seizure of personal luggage.

Arkansas v. Sanders, 442 U.S. 753, 765 n.14 (1979).

247. Carroll v. United States, 267 U.S. 132, 153 (1925):

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant. . . .

248. Robbins v. California, 453 U.S. 420, 438 (1980) (Rehnquist, J., dissenting) (citation omitted):

> Courts, including this Court, often make the rather casual assumption that police are not substantially frustrated in their efforts to apprehend those whom they have probable cause to arrest or to gather evidence of a crime when they have probable cause to search by the judicially created preference for a warrant, apparently assuming that the typical case is one in which an officer can make a quick half mile ride to the nearest precinct station in an urban area to obtain such a warrant. . . . But

tutional protection throughout the country. It may be used to justify even those delayed searches in cases where the police experience no difficulty towing and safekeeping the vehicle and find it desirable to do so.[249] Acceptance of the argument concerning the vehicle itself does not allow for its application to personal effects taken from the vehicle. Such items can be transported and secured at the police station while a warrant is sought as easily as any other similar item seized anywhere else.[250] The fact that it comes from an automobile provides no greater justification for the warrantless search.

If impracticability is the reed on which the exception currently stands, it is indeed a fragile one. Its lack of reason is personified in *Johns*. For if it can be said that it was impracticable to obtain a warrant to search the packages seized three days earlier and stored in a DEA warehouse, then it is always impracticable to obtain a search warrant, no matter the circumstances.

Impracticability serves the Court's purposes because it is more practical and functional a term than mobility. It has never been defined and thus lacks limitation. It has been used to uphold searches where the only conceivable impracticability in obtaining a search warrant was mild inconvenience, previously held insufficient as an excuse for not obtaining a warrant.[251] Moreover, it flies in the face of the intent of the framers of the fourth amendment who sought to interpose inconvenience between a citizen's privacy and

---

this casual assumption simply does not fit the realities of sparsely populated "cow counties" located in some of the Southern and Western States, where at least apocryphally the number of cows exceeds the number of people and the number of square miles in the county may exceed 10,000 and the nearest magistrate may be 25 or even 50 miles away.

249. In Cady v. Dombrowski, 413 U.S. 433 (1973), the Court upheld a search of a car which was towed to a garage. The damaged car was towed because it was a "nuisance." Police officers justified the search for the defendant-police officer's gun on the grounds that they feared vandals would obtain it. During the search, police found evidence incriminating the defendant in a murder. No mention was made of the possibility of towing the vehicle to the police station. The Court merely concluded "that the type of caretaking 'search' conducted here of a vehicle that was neither in custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained." *Id.* at 447-48.

250. *Compare* Arkansas v. Sanders, 442 U.S. 753, 756 (1979) (warrant necessary for search of closed container not part of automobile search itself) *and* United States v. Monclavo-Cruz, 662 F.2d 1285, 1287 (9th Cir. 1981) (purse of passenger in automobile seized, invalidated warrantless search at police station one hour later) *with* Brett v. United States, 412 F.2d 401, 405 (5th Cir. 1969) (warrantless search of defendant's clothes held in property room for three days held improper).

251. *See* Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971): "The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency."

the ability of government agents to disturb that privacy.[252] The demise of exigent circumstances and the substitution of general catch-all terms is continuing evidence that the present Supreme Court majority holds the warrant to be an unnecessary tool for controlling the exercise of police discretion in public encounters with citizens.[253]

None of the three 1985 automobile exception cases presented a credible situation for finding that exigent circumstances actually existed to justify a warrantless search. Of those three, the facts in *Castleberry* came the closest to presenting an exigent circumstance, but that was the one case where the Court affirmed the state court decision disallowing the search in reliance on the *Sanders* limitation. In the one case thus presenting a semblance of an exigency argument, the police decision to search was not upheld. In *Johns* and *Carney* where no conceivable necessity or even inconvenience argument could be advanced, the warrantless searches were allowed. The state of fourth amendment law and especially the automobile exception is that the case adhering more closely to established constitutional principles appears out of line because of repeated failure to adhere to those principles.

IV. CONCLUSION

The reasoning which led to the result in *Castleberry*, though unstated, is desirable because it is fully consistent with traditional fourth amendment jurisprudence. There was no need for an immediate warrantless search of the suitcases or Band-Aid box. Therefore, the warrantless search was not permitted. Obviously, the result does not rest upon a necessity test because that test has been so eroded that, for all intents and purposes, it no longer exists. The *Castleberry* result rests squarely and perilously upon *Sanders*, the remaining limitation on the automobile exception. By itself, divorced from a necessity test, this limitation makes no more sense than the unlimited breadth of the exception itself. True, there was

252. A classic reading of the fourth amendment can be found in Johnson v. United States, 333 U.S. 10, 14 (1948):

> Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

253. Some members of the court have demonstrated a cavalier attitude in disregarding the warrant requirement. *See supra* notes 9-10 and accompanying text.

no need for a warrantless search, but the automobile exception no longer rests on need. Instead, the exception rests on the intellectual mush variously described as "general impracticability" and a combination of other equally meaningless phrases. The fourth amendment has been supplanted by a set of presumptions and fictions for the professed purpose of providing guidance to police officers,[254] when the factual contexts being decided rarely conform to the presumptions upon which the rules rely. Instead of determinations based upon the facts of each case, the amendment's warrant requirement has been nullified by generalities which exist for the single purpose of reducing the amendment's impact upon criminal litigation and, thus, upon how police behave in our society.

A Supreme Court at full strength is likely to reconsider and alter the *Sanders-Castleberry* rule. What form that change takes will clearly dictate the breadth of major impending changes to the warrant requirement. A limited modification bringing the rule into line with the rest of the automobile exception would be consistent with the Court's claim that automobiles are different and merit different treatment. Such a modification of the *Sanders-Castleberry* rule might allow an immediate warrantless search of containers found in automobiles suspected of carrying contraband. In *Castleberry*, the officer attempted to arrest the suspects and seize the items as soon as he confirmed the facts of the tip on which he was acting.[255] Under the likely modification of *Sanders-Castleberry*, this search would be upheld. A limitation consistent with the rule at present would allow police to search containers in cars where probable cause exists to search the contents of those containers, but only where the facts demonstrate that the officer did not delay in order to defeat the warrant demand.

Obviously, even this proposed modification of the *Sanders-Castleberry* reasoning, like the automobile exception, deviates from traditional fourth amendment jurisprudence in that it would allow a warrantless search where one is unnecessary. It is proposed in recognition that necessity is no longer a consideration when determining the scope of the automobile exception. It is also offered with the hope that adherence to this proposal would limit expansion of the exception by excluding those situations where the officer delayed

254. *See supra* note 111.

255. Castleberry v. State, 678 P.2d 720, 722 (1984). The officer in *Castleberry* went immediately to the hotel where the alleged narcotics transfers were taking place and confirmed the informant's tip. While the officer waited for back-up assistance, the defendants emerged from the hotel. The officer then had to identify himself and arrest the defendants. *Id.*

the intrusion solely for the purpose of subverting fourth amendment requirements. Sadly, the automobile exception cases offer no assurance that the Supreme Court majority will even accept this minor limitation upon the further expansion of the automobile exception. The Court may not even agree that this limited prevention of subversion of the warrant requirement is indeed desirable.

A total rejection of the *Sanders-Castleberry* rule will inevitably lead to a reconsideration of the proposition, previously rejected by the Supreme Court in *Chadwick*, that only homes, offices and private communications implicate interests at the core of the fourth amendment. The government contended in *Chadwick* that only in these core contexts should a determination of reasonableness turn on whether a warrant is obtained.[256] In all other contexts, the reasonableness of an intrusion would turn merely on whether there was probable cause to believe evidence of criminal conduct is present. The government suggested that the diminished expectation of privacy upon which the automobile exception rests supports similar treatment for all effects found outside of those repositories, like homes and offices, where privacy interests are traditionally recognized as deserving greater fourth amendment protection.[257]

A general rule might state that *Chimel* simply is inapplicable following an arrest in a public place, confining the protections of the *Chimel* rule to the facts of that case where the arrest took place at the defendant's home. This rule would borrow upon the lore developed around automobiles under the automobile exception and now, after *Belton*, searches incident to arrest. Reliance would be placed upon a theoretically diminished expectation of privacy that attaches to an individual once that person is in public. *Belton* represented an amalgam of two exceptions, for the fact that the search was of an automobile played an overwhelming role. The Supreme Court's willingness to ascribe diminished, or negligible, privacy interests in automobiles obviously influenced *Belton's* redrafting of incidental searches in this context. All of the rationales theoretically justifying a diminished expectation of privacy in an automobile serve to explain the rationale for *Belton*. But those rationales have never withstood analysis, nor do they truly distinguish an automobile from any other regulated or inspected locale. Moreover, the actual expectation of privacy for items secured in an automobile is probably

256. *See supra* notes 119-22 and accompanying text.

257. *See, e.g.*, Oliver v. United States, 104 S. Ct. 1735, 1735 (1984) (defendants tried to conceal marijuana in secluded field, erected fences with no trespassing signs; held these considerable steps to insure privacy did not legitimize their expectation of privacy).

greater and under no circumstance less than an item similarly wrapped and carried in public.

Actually, little stands between acceptance of the government's proposed redefinition of the warrant requirement in *Chadwick* other than Chief Justice Burger's denunciation of the proposal in the majority opinion in that case. Various facets of the *Chadwick* rule have been eroded,[258] leaving very little of the principles upon which the rule rested. After all, no meaningful distinction can be drawn between a personal effect, such as the footlocker in *Chadwick,* seized in a public place and a footlocker or other container taken from an automobile stopped and seized on the highway. Any justification offered for the exemption of automobiles and their contents from the warrant requirement is equally applicable or meaningless to every other item seized in public. It matters not which rationale may support the automobile exception at any given moment.

The diminished expectation of privacy in an automobile seems a strong rationale for a public place exemption, but it sheds no additional light upon these critical distinctions. Even if the vehicle itself can somehow be the subject of diminished expectations of privacy because of pervasive regulation and because of its primary purpose as transportation, it is nearly impossible to understand why a container secreted out of sight in a vehicle, whether under the seat or inside a locked glove compartment or trunk, merits less protection than an item carried in a public place subject to theft or an inadvertant opening.[259]

The third prong of the privacy analysis is configuration—whether an item is so structured to present a legitimate expectation of privacy. It cannot explain a diminished expectation of privacy in the closed and locked separate compartments of a vehicle, and certainly not in a mobile home. Reason again took a back seat when the Court in *Carney* purported to rationalize the warrantless search of the mobile home not only on the basis of the trailer's mobility but

258. The Court successfully eroded much of *Chadwick* by upholding the search incident to arrest in New York v. Belton, 453 U.S. 454, 456 (1981) (search included containers inside interior compartment of car following arrest); and by upholding the inventory search in Illinois v. Lafayette, 462 U.S. 640, 647 (1983) (delayed search at police station of defendant's shoulder bag). In neither of these cases was there a threat of a weapon being used against the arresting officer nor was there any threat of evidence tampering since the defendant was already in custody.

259. United States v. Ross, 456 U.S. 798, 823 (1982) ("Certainly the privacy interests in a car's trunk or glove compartment may be no less than in a movable container."). Conversely, privacy interests in a movable container may be no greater than those in a locked glove compartment.

also because of a diminished expectation of privacy.[260]

In *Carney*, Chief Justice Burger analogized the distinction between "worthy automobiles" and "unworthy automobiles" to the discredited worthy container test as a way of avoiding analysis of the actual privacy interest in the motor home.[261] The only meaningful way to distinguish that house trailer, which had all of its windows covered, including the front windshield, and a traditional home is that the house trailer was in a public forum. The Court's application in *Carney* of the exception to a house trailer confirms what the Supreme Court did in *Ross*, and again in *Johns*, when it extended the automobile exception to include an automobile's contents. The exception has become a public place exception eliminating the warrant requirement for all effects found in public places. *Chadwick* and the *Sanders-Castleberry* rules are walking corpses that simply have not yet been laid to rest.

The notion of a public place exception to the warrant requirement, rather than the constantly changing automobile exception, is consistent with this Court's belief that only within the cocoon of a home are the intimate activities protected by the full extent of the fourth amendment.[262] Moreover, that protection is secured only so long as one remains tightly within the cocoon. The Court is unwilling to protect conduct which takes place out of the home.

Full participation in modern society increasingly involves moving one's activities into a public setting. If we wish to preserve our society as one which promises every individual freedom from unwarranted police interference, it is essential that our courts develop new ways of protecting our privacy and controlling police discretion, ways that provide us with maximum protection consistent with essential law enforcement interests. We need a fourth amendment jurisprudence modeled on *Carroll* and *Chimel*. The current Court seems intent on providing instead a "bright line" jurispru-

260. The privacy analysis in *Carney*, however, did not extend to all three prongs of the privacy test. *See supra* note 168.

261. Chief Justice Burger wrote:

> In *United States v. Ross*, we declined to distinguish between "worthy" and "unworthy" containers, noting that "the central purpose of the Fourth Amendment forecloses such a distinction." We decline today to distinguish between "worthy" and "unworthy" vehicles which are either on the public roads and highways, or situated such that it is reasonable to conclude that the vehicle is not being used as a residence.

California v. Carney, 105 S. Ct. 2066, 2070 (1985) (citation omitted).

262. Oliver v. United States, 104 S. Ct. 1735, 1742 (1984): "Only the curtilage, and not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home."

dence of searches focused on police convenience instead of the interests the fourth amendment was intended to protect. Since "police convenience" has no natural bounds, we can expect to see "bright lines" drawn around ever-increasing zones of previously protected space. Unless the court changes its approach, it is only a matter of time until the justices acknowledge that the automobile exception has served only as an incubator for more far-reaching exemptions from the warrant requirement.